

Fujii v Hong

2021 NY Slip Op 31864(U)

June 4, 2021

Supreme Court, New York County

Docket Number: 150064/2021

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

Trent Fujii

INDEX NO. 150064/2021

- v -

Michelle Hong et al

MOT. DATE

MOT. SEQ. NO. 1&2

The following papers were read on this motion to/for
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits

In this action, plaintiff seeks to recover damages for, inter alia, "battery, fraud, prima facie tort, and intentional infliction of emotional distress" as a result of defendant Michelle Hong's acts (so-called Verified Complaint para. 1). Plaintiff alleges that he is the victim of Hong's plan "to cause as much emotional and physical harm to Plaintiff as possible during the course of the parties' relationship." (so-called Verified Complaint para. 2.) Specifically, Hong allegedly "lied to Plaintiff, stating she was unmarried, had no children, was incapable of having children, that she was on birth control, and that she took emergency contraceptive" when these claims were untrue (so-called Verified Complaint para. 2-3). Meanwhile co-defendant Grace Chung allegedly knew Hong was deceiving plaintiff as part of a scheme to "deceiv[e] men into carrying on relations with her under the guise that she was unmarried and had no children."

Two motions are presently pending. In motion sequence 1, plaintiff moves for a default judgment against Hong. In motion sequence 2, defendant Eunhye Chern sued herein as Grace Chung moves to dismiss plaintiff's complaint while plaintiff cross-moves to disqualify Nima America, Esq. and the Ameri Law firm from serving as counsel for both or either of the defendants. There is no opposition to the cross-motion or motion sequence 1 while plaintiff opposes Chern's motion to dismiss.

At the outset, the court notes that while this action was commenced by a so-called Verified Complaint, the complaint lacks any verification. Further, the court notes that while plaintiff filed an amended complaint (NYSCEF Document Number 2), that document was returned for correction and is therefore not an operative pleading. The court will first consider the motion to dismiss, since its disposition impacts the cross-motion.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only

Dated: 6/4/21

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [] GRANTED IN PART [X] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

The sole cause of action against Chern is for aiding and abetting tort. Plaintiff specifically alleges that Chern knew that Hong was married, not single and had children with his then-current husband. Plaintiff further alleges that Chern also knew that Hong “had a history of deceiving men into carrying on relations with her under the guise that she was unmarried and had not children.” Plaintiff further asserts:

Thus, on or about December 1, 2020 through January 31, 2020 Defendant Chung provided substantial assistance to Defendant Hong in carrying out her deceitful, malicious, and generally fraudulent behavior by ratifying to Plaintiff Defendant Hong’s false statements, which Defendant Chung knew to be false at the time of ratification to Plaintiff. Therefore, Defendant Chung had actual knowledge of the Defendant Hong’s tortious plan, and provided substantial assistance to Defendant Hong by ratifying Plaintiff’s false statements to Plaintiff. Accordingly, Defendant Chung is liable to Plaintiff in an amount to be determined after trial, but not less than \$25,000.00.

“A plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance” (*Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]). “The essential elements of a cause of action for fraud are ‘representation of a material existing fact, falsity, scienter, deception and injury’” (*New York Univ. v. Continental Ins. Co.*, 87 NY2d 308 [1995], quoting *Channel Master Corp. v. Aluminum Ltd. Sales*, 4 NY2d 403 [1958]). Plaintiffs’ claims sounding in fraud and aiding and abetting fraud must be pleaded with specificity (CPLR § 3016[b]; see *i.e.* *Dumas v. Fiorito*, 13 AD3d 332 [2d Dept 2004]).

Chern argues that plaintiff has failed to sufficiently allege an underlying fraud which Chern then aided and abetted, plaintiff’s claims lack specificity and the allegation that Chern “provided substantial assistance,” to Hong is insufficient to state a claim. The court agrees with Chern that the allegation that Chern “provided substantial assistance” is too conclusory to support the cause of action. Therefore, Chern’s motion to dismiss the sole cause of action against her is granted and the fifth cause of action is severed and dismissed. In light of this result, the court denies as moot plaintiff’s cross-motion to disqualify.

The court now turns to the motion for a default judgment. Plaintiff has provided proof that both the motion and the summons and complaint were served upon Hong. Despite such service, Hong has not answered the complaint nor has her time to do so been extended by the court. Therefore, Hong has defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a prima facie cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept 1996]; and CPLR § 105 [u]).

Plaintiff’s motion is supported by his own affidavit, wherein he claims the following. Plaintiff and Hong met on a dating app on November 16, 2019. They met in-person on or about December 1, 2019 for their first date, at which time Hong told plaintiff in sum and substance “that she liked me, was single and not dating anyone else, and wanted to be ‘exclusive’ with me”. Plaintiff and Hong continued to see each during a little over a month, during which time they had a physical relationship. Hong allegedly

told plaintiff that she was using contraception and suffered from medical conditions which prevented her from becoming pregnant. On or about January 10, 2020, Hong informed plaintiff that she was married to another man and had a child. Plaintiff then claims that he was “mortified”, his “world came crashing down” around him and he “was emotionally and physically shaken by what [] Hong had just confessed to.” Plaintiff further claims that he began to suffer from “anxiety and panic attacks”. On or about February 22, 2020, plaintiff informed defendant that he “no longer wished to see or communicate with her.”

Hong then made a false report to the NYPD that plaintiff was suicidal, causing officers from the NYPD to “respond[] and further harass [plaintiff]”. In June 2020, plaintiff began seeing another psychologist “who specialized in this type of emotional trauma”. Meanwhile, plaintiff claims that he continues to suffer from anxiety and panic attacks and his “ability to perform at [his] place of work” has been “drastically compromised, causing a reduction in my number of billable hours, as well the inability to focus on the tasks at hand.” Plaintiff alleges lost profits of \$15,000 in 2019 and \$27,000 in 2020.

Plaintiff’s causes of action asserted against Hong are as follows: battery, intentional infliction of emotional distress, prima facie tort and fraud. A cause of action for battery requires bodily contact, with intent that was offensive in nature (*Hassan v. Marriott Corp.*, 243 AD2d 406 [1st Dept 1997]). “While physical injury need not be present for an assault, there must be conduct that places the plaintiff in imminent apprehension of harmful contact” (*id.* at 407). Since plaintiff has failed to allege the necessary elements of a cause of action for battery against Hong, the motion is denied as to the first cause of action, which is severed and dismissed.

A cause of action for intentional infliction of emotional distress has 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” (*Chanko v. American Broadcasting Companies Inc.*, 27 NY3d 46 [2016] quoting *Howell v. New York Post Co.*, 81 NY2d 115 [1993]). This cause of action is subject to a one-year statute of limitations (CPLR § 215[3]; see *Bellissimo v. Mitchell*, 122 AD3d 560 [2d Dept 2014]).

A plaintiff bears a heavy burden of alleging a claim for intentional infliction of emotional distress (*Howell v. New York Post Co., Inc.*, 81 NY2d 115 [1993]). Plaintiff must assert conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ... and [is] utterly intolerable in a civilized community” (*Kickertz v. New York University*, 110 AD3d 268, 277-278 [1st Dept 2013] citing *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15 [2008]).

While the court does not condone Hong’s alleged acts, the court cannot say that such conduct is “beyond all possible bounds of decency” and “utterly intolerable in a civilized community” as to be actionable (*Suarez v. Bakalchuk*, 66 AD3d 419 [1st Dept 2009] quoting *Murphy v. American Home Prods. Corp.*, 58 NY2d 293 [1983]). Accordingly, the motion is also denied as to the second cause of action and this claim is dismissed.

The elements of the cause of action for *prima facie* tort is “an intentional infliction of harm, without excuse or justification, by an act or series of acts that would otherwise be lawful” (*Lerwick v. Kelsey*, 24 AD3d 931 [3d Dept 2005] citing *Freihofer v. Hearst Corp.*, 65 NY2d 135 [1985]). A plaintiff must also demonstrate special damages and that the defendant acted with “disinterested malevolence” (*Kickertz v. New York University*, 110 AD3d 268 [1st Dept 2013]). The motion is denied as to this cause of action as well, since plaintiff has not alleged that Hong acted with disinterested malevolence. Accordingly, the third cause of action is also dismissed.

As for the fraud claim, the court finds that plaintiff has established a *prima facie* cause of action against Hong on default. Therefore, plaintiff’s motion for a default judgment against Hong is granted only to the extent that plaintiff is granted a default judgment on Hong’s liability as to the fourth cause of action. Plaintiff’s damages, if any, are to be determined at inquest.

CONCLUSION

Accordingly, it is hereby

ORDERED that motion sequence 2 is granted to the extent that the fifth cause of action against defendant Eunhye Chern sued herein as Grace Chung is severed and dismissed and plaintiff's cross-motion is denied as moot; and it is further

ORDERED that plaintiff's motion sequence 2 is granted only to the extent that plaintiff is granted a default judgment on defendant Michelle Hong's liability as to the fourth cause of action for fraud. Plaintiff's damages, if any, are to be determined at inquest; and it is further

ORDERED that the balance of plaintiff's motion for a default judgment is denied as moot and the first through third causes of action are severed and dismissed; and it is further

ORDERED that plaintiff is directed to file note of issue on or before July 20, 2021 so that this action may be scheduled for an inquest.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 6/4/21
New York, New York

So Ordered: [Signature]
Hon. Lynn R. Kotler, J.S.C.