

Waterbury v New York City Ballet, Inc.
2021 NY Slip Op 32786(U)
December 27, 2021
Supreme Court, New York County
Docket Number: Index No. 158220/2018
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

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ALEXANDRA WATERBURY,

Plaintiff,

- v -

NEW YORK CITY BALLET, INC., JARED LONGHITANO,
CHASE FINLAY, SCHOOL OF AMERICAN BALLET, AMAR
RAMASAR, ZACH CATAZARO

Defendant.

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INDEX NO. 158220/2018
MOTION SEQ. NO. 014

**DECISION + ORDER
ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 014) 260, 261, 262, 263, 265, 266, 267, 268, 269, 280, 281, 284

were read on this motion to/for

DISMISSAL

Upon the foregoing documents, the motions are resolved as follows:

Factual and Procedural History

This action arises out of a consensual romantic relationship between Alexandra Waterbury, a former student at the School of American Ballet (“SAB”), and Chase Finlay, a former employee and principal ballet dancer at the New York City Ballet (“NYCB”). In her amended complaint, Waterbury asserts that Finlay surreptitiously recorded, saved, and shared nude and sexually explicit photographs and videos of her and other female NYCB dancers. Waterbury also contends that Finlay sent vulgar and demeaning text messages about the plaintiff to defendants Zach Catazaro, Jared Longhitano, and Amar Ramasar. In his answer with counterclaims, Finlay alleges he was attacked by Waterbury during their purported volatile relationship and that she trespassed into his apartment to improperly access his computer and take screenshots of electronic data. Finlay claims that Waterbury improperly used publicity attendant to her claims to increase her visibility on social media.

In the instant motion, Waterbury seeks an order, pursuant to CPLR 3211(a)(5) and 3211(a)(7), dismissing Finlay's five counterclaims and an order, pursuant to CPLR 3024(b), striking allegedly scandalous and prejudicial material. The motion is granted to the extent of dismissing the counterclaims for assault, battery, conversion, and invasion of privacy. The motion is also granted to the extent of dismissing the trespass claim to the extent that it seeks the imposition of punitive and exemplary damages but denied as to nominal damages.

DISCUSSION

Finlay's Counterclaims of Assault and Battery

Finlay alleges that Waterbury physically attacked him on three separate occasions: May 11-13, 2017 (Answer ¶¶ 398-402, 494-495), November 22, 2017 (Answer ¶¶ 404-406), and January 30, 2018 (Answer ¶¶ 408-12). Pursuant to CPLR 215(3), the statute of limitations for assault and battery is one year from the date of the respective incident. Finlay did not interpose causes of action relating to these three incidents until October 16, 2020, which renders these claims untimely. To salvage these claims, Finlay asserts that his counterclaims for assault and battery should relate back to the filing of Waterbury's complaint on September 4, 2018. However, his counterclaims have no relationship to the alleged transactions and occurrences that form the basis Waterbury's claims. As such, these claims do not relate back to the date Waterbury filed her complaint. Accordingly, the first counterclaim for assault and the second counterclaim for battery are both dismissed as untimely.

Conversion

Finlay alleges that Waterbury converted his apartment keys, photographs, and text messages. A claim of conversion requires factual allegations showing that the proponent had legal ownership or an immediate superior right of possession to specific and identifiable property and

that the other party exercised dominion over the property or interference with it, in derogation of the proponent's rights. *See, Fusari v. 400 W. 59th St.*, 2019 WL 2648071. Here, Finlay has failed to allege facts showing Waterbury deprived him of the use of any specific property. Further, Finlay asserts that deleted all nude and sexually explicit material of Waterbury at her request. Finally, Finlay was not deprived of the use of his apartment. Accordingly, the third counterclaim for conversion is dismissed.

Trespass

Finlay alleges that Waterbury trespassed when she allegedly entered his apartment on May 25, 2018 without permission. A person commits a trespass when he or she enters upon the property of another without justification or permission. New York Pattern Jury Instruction 3:8 (trespass to land); *Berenger v. 261 W LLC*, 93 A.D.3d 175, 181 (1st Dept 2012); *Long Is Gynecological Servs, P.C. v. Murphy*, 298 A.D.2d 504 (2d Dept 2002). Here, Waterbury claims that she was not trespassing as Finlay provided her with a set of keys and unfettered access to his apartment. This factual assertion, however, requires further factual development. Next, Waterbury asserts that Finlay was not consequentially damaged by any intrusion, which Finlay essentially concedes. The absence of an actual injury, however, is not a basis for dismissing a trespass claim as nominal damages are presumed. *Burger v. Singh*, 28 A.D.3d 695 (2d Dept 2006); *Madison 96th Assoc., LLC v 17 E. 96th Owners Corp.*, 120 AD3d 409, 411 (1st Dept 2014) (citing, *Kronos, Inc. v. AVX Corp.*, 81 N.Y.2d 90, 95–96, (1993)). Finally, there is nothing asserted by Finlay that would support a potential recovery of punitive damages. Accordingly, the motion to dismiss defendant's fourth cause of action for trespass is granted to the extent of dismissing any request for punitive and exemplary damages but denied as to a potential recovery for nominal damages.

Invasion of Privacy

Finlay asserts that Waterbury used his name and photo to promote her modeling career and clothing design company. New York's "limited statutory right of privacy" prohibits the use of "a living person's name, portrait, or picture for advertising or trade purposes without having first obtained the written consent of such person[.]" *Lohan v. Take-Two Interactive Software, Inc.*, 31 N.Y.3d 111 (2018). Here, Finlay fails to allege any specific, non-conclusory facts showing that Waterbury used his image to promote her products or business ventures. Finlay further fails to articulate how Waterbury's use of his image was commercial or non-incidental, and therefore actionable. Accordingly, the counterclaim for alleged invasion of privacy is dismissed.

Motion to Strike Pursuant to CPLR 3024(b)

Waterbury seeks to have stricken certain matters as irrelevant and prejudicial. This motion is granted to the extent of directing Finlay to file an amended answer with counterclaims that removes the causes of action that have been dismissed. This includes factual allegations relating to the alleged volatile nature of the parties' relationship. Such matters may be appropriate material for cross-examination but are not appropriate for the pleadings given the singular cause of action that survived the motion to dismiss. With regard to paragraphs 418 to 426, and 441 to 444, of Finlay's answer with counterclaims, the second sentence of paragraph 421 is stricken.

It is therefore

ORDERED that Finlay's First, Second, Third, and Fifth counterclaims are dismissed; and it is further

ORDERED that Finlay's Fourth counterclaim is dismissed to the extent that it seeks for punitive and exemplary damages but denied as to a potential recovery for nominal damages.

ORDERED that there is no stay regarding discovery and therefore the parties are directed to proceed with discovery without delay.

This constitutes the decision and order of this Court.



12/27/2021
DATE

JAMES D'AUGUSTE, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: