

Burton v Porcelain
2021 NY Slip Op 34308(U)
July 22, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 5606/2019
Judge: Andrew A. Crecca
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.

SHORT FORM ORDER

INDEX No. 5606/2019SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 57 - SUFFOLK COUNTY**PRESENT:**Hon. ANDREW A. CRECCA
Justice of the Supreme CourtMOTION DATE 6/4/20 (#001)
MOTION DATE 8/20/20 (#002)
ADJ. DATE 9/25/20
Mot. Seq. #001 MotD
Mot. Seq. #002 XMD-----X
JEANNE R. BURTON,

Plaintiff,

- against -

MICHAEL PORCELAIN and "JOHN-JANE
DOE #1 to JOHN-JANE DOE #10," the last 10
names being fictitious and unknown to plaintiff,
the persons or parties intended to be any
unknown co-conspirators of the defendant
MICHAEL PORCELAIN,Defendants.
-----XSTEVEN M. BURTON, ESQ.
Attorney for Plaintiff
P.O. Box 697
Central Islip, New York 11722LUPKIN PLLC
Attorney for Defendant Michael Porcelain
80 Broad Street, Suite 1301
New York, New York 10004LAW OFFICES OF THOMAS F. LIOTTI, LLC
Attorney for Defendant Michael Porcelain
600 Old Country Road, Suite 530
Garden City, New York 11530LONG TUMINELLO, LLP
Attorney for Defendant Michael Porcelain
120 Fourth Avenue
Bay Shore, New York 11706

Upon the notice of motion filed by plaintiff on May 19, 2020 (#001); the opposition filed by defendant on August 12, 2020; the reply filed by plaintiff on August 13, 2020; the cross motion filed by defendant on August 7, 2020 (#002); the opposition filed by plaintiff on September 4, 2020; and the reply filed by defendant on September 24, 2020; it is

ORDERED that plaintiff Jeanne R. Burton's motion for an order dismissing defendant Michael Porcelain's first through fourth counterclaims pursuant to CPLR 3211, and striking all or part of defendant Michael Porcelain's answer pursuant to CPLR 3024, is granted to the extent of dismissing defendant's second through fourth counterclaims and directing defendant to serve and file an amended answer in accordance with this order within twenty (20) days after service of a copy of this order with notice of its entry, and is otherwise denied; and it is further

Burton v Porcelain
Index No. 5606/2019
Page 2

ORDERED that defendant Michael Porcelain's cross motion for an order granting sanctions against plaintiff and her attorney pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (c) is denied.

Plaintiff Jeanne R. Burton commenced this action by filing the summons and verified complaint on or about October 23, 2019. By her complaint, plaintiff asserts five causes of action against defendant Michael Porcelain for defamation, intentional infliction of emotional distress, and negligent infliction of emotional distress. Issue was joined by service and filing of Porcelain's verified answer dated March 17, 2020. By his answer, Porcelain generally denies the allegations in the complaint, pleads 30 affirmative defenses, and asserts four counterclaims: the first, alleging violation of Civil Rights Law §§ 70-a and 76-a; the second, for abuse of process; the third, alleging violation of Judiciary Law § 487; and the fourth, for slander.

Burton, an attorney, practices in the area of family law and has received numerous court appointments in Suffolk County Family Court and Suffolk County Supreme Court to represent minor children as the Attorney for the Child ("AFC"). Burton was appointed AFC in Family Court proceedings in Suffolk County that involved Philip J. Porter III ("PJ"), the son of Barbara Porter, Porcelain's girlfriend. On March 25, 2018, PJ passed away at the age of 18. At the time of his death, Burton was AFC in a number of actions involving PJ, including a neglect proceeding brought by PJ's mother against PJ's paternal grandmother, a custody case brought by the paternal grandmother against PJ's mother, and a PINS proceeding brought by PJ's mother against PJ.

LETTERS TO FAMILY COURT JUDGES

By her complaint, Burton alleges that on or about August 21, 2018, Porcelain sent a letter to all judges of the Suffolk County Family Court which contained numerous false statements meant to disparage Burton's reputation in an attempt to have Burton removed from all cases in which she had been appointed AFC. The letter also included a threat by Porcelain that he intended to go to the media with the allegations. Porcelain sent a second letter to all Suffolk County Family Court judges on or about October 28, 2018, reiterating the allegations in the first letter and, in addition to his threat to go to the media, threatening to go to the FBI with the allegations.

Burton further alleges that sometime in the fall of 2018 Porcelain hid his identity, purchased a domain name, created a website ("investigateburton.com"), and purchased email addresses to use from the website to publish false and defamatory information about Burton and to send false and defamatory emails to court attorneys, judges, referees, and attorneys who practice family law in Suffolk and Nassau Counties.

EMAIL BLASTS

Burton alleges that beginning in November 2018 Porcelain sent a series of email blasts to judges and attorneys who practice in Family Court, all of which were sent from an email address associated with the website and meant to give the impression that the emails were from a court official. The emails were sent from the email address "Clerks Anonymous<familycourt@investigateburton.com>". Burton alleges that in

Burton v Porcelain
Index No. 5606/2019
Page 3

addition to making false and defamatory statements about her, these emails were meant to influence the judge in the pending Family Court cases involving PJ's mother in which Burton was AFC. The first email blast, dated November 4, 2018, announced the launch of the website, contained false allegations that two minor children died during Burton's representation, commented on the significant monetary value of two homes owned by Burton, and published her home addresses. The November 4th email was followed by five additional email blasts dated November 29, 2018, December 13, 2018, February 19, 2019, March 6, 2019, and March 26, 2019. These email blasts included numerous allegations against Burton, including that disciplinary charges were pending against her, that she committed civil torts and crimes, that she improperly interfered in the neglect case brought by PJ's mother and disclosed privileged communications, that two children died from drug overdoses while Burton served as their AFC, that she encouraged a court officer to unlawfully conceal information from the Family Court, and that she concealed material evidence. They also included accusations that Burton is corrupt, violated her fiduciary duty, and committed legal malpractice. Although each of the email blasts included a closing (i.e., "Thank you", "Happy Holidays", "Respectfully yours"), none identified the author(s) of the email by name.

Burton alleges that, in addition to the email blasts from the "Clerks Anonymous" address, Porcelain created a second email address in March 2019 intended to appear as if it were from a New York Newsday reporter ("newstaff@ny-newsday.com"), and that Porcelain sent communications from that address to at least two attorneys known to Burton in a further attempt to disparage her.

THE WEBSITE

According to the complaint, the website created by Porcelain in the fall of 2018, "www.investigateburton.com", was revised on at least two occasions between its creation and the filing of this action. The initial version of the website had a large caption in bold letters stating "2 DEAD CHILDREN?" and included images of two homes owned by Burton along with the addresses, together with allegations that Burton was a crook in her billing practices and that she could never afford these homes. The website also included allegations that two children in Suffolk County died during Burton's representation, and that Burton conducted trials and hearings remotely from Colorado while she was representing children in Suffolk County. In November 2018, a subsequent version of the website appeared with more allegations that Burton conducted trials over the phone from Colorado, and that she was the cause of two children dying during her representation. It included photos and the address of Burton's residence, and ended with "please help prevent another dead child." In or about March 22, 2019, the third version of the website added the words "Criminal Acts," and alleged that Burton stole court records and may have criminally obtained confidential court reports for her private use. Burton further alleges that in an effort to direct online searches of Burton's name to his website, Porcelain paid for an advertisement so that the website would appear at or near the top of any search of her name. According to the complaint, Burton commenced a proceeding in Supreme Court seeking pre-action discovery, which was granted by the court on or about August 21, 2019 (Rebolini, J.), and directed the disclosure of the owner/registrator of the website "investigateburton.com" (see *Burton v DOMAINS BY PROXY*, Index No. 1617/2019). In or about September 2019, defendant Porcelain identified himself on the website.

Burton v Porcelain
Index No. 5606/2019
Page 4

Burton alleges that by these actions Porcelain intended to harm her personally and professionally, hold her up to public ridicule, and destroy her career as a practicing attorney. Burton further alleges that Porcelain was involved with the planning and strategies implemented in the Family Court cases involving PJ's mother, and that Porcelain's actions against her were intended to influence the judge assigned to the Family Court cases for which Burton was AFC.

Burton now moves for an order dismissing Porcelain's counterclaims and striking the answer or select portions thereof pursuant to CPLR 3024. Porcelain cross-moves for sanctions pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (c).

"On a motion to dismiss a counterclaim pursuant to CPLR 3211 (a) (7), a court must accept as true the facts as alleged in the pleading, accord the pleader the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Wand, Powers & Goody, LLP v Yuliano*, 144 AD3d 1017, 1018, 42 NYS3d 229 [2d Dept 2016]; *see McKesson Medical-Surgical Minn. Supply, Inc. v Caremed Supplies, Inc.*, 164 AD3d 1441, 84 NYS3d 222 [2d Dept 2018]; *see also Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Nevertheless, bare legal conclusions and factual claims which are flatly contradicted by the record are not presumed to be true (*see Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 48 NYS3d 450 [2d Dept 2017]; *International Fid. Ins. Co. v Quenzer Elec. Sys., Inc.*, 132 AD3d 811, 18 NYS3d 645 [2d Dept 2015]; *Gershner v Eljamal*, 111 AD3d 664, 974 NYS2d 576 [2d Dept 2013]). "Dismissal of the [counterclaim] is warranted if the [counterclaimant] fails to assert facts in support of an element of the [counterclaim], or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142, 53 NYS3d 598 [2017]; *see Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134, 980 NYS2d 21 [1st Dept 2014]).

The first counterclaim alleges that Burton's action constitutes an impermissible strategic lawsuit against public participation within the meaning of Civil Rights Law §§ 70-a and 76-a, commenced for the purpose of "harassing, intimidating, punishing or otherwise maliciously inhibiting" Porcelain's exercise of free speech on a matter of public concern, namely, Burton's inclusion on the list (or panel) of attorneys designated by the Appellate Division, Second Department, as qualified to represent children in certain court proceedings. Strategic lawsuits against public participation, commonly known as SLAPP suits, are brought not to seek redress for meritorious claims, but to deter or to punish individuals and groups from exercising their rights (*see e.g. Liberty Synergistics Inc. v Microflo Ltd.*, 718 F3d 138 [2d Cir 2013]; *Allan & Allan Arts v Rosenblum*, 201 AD2d 136, 615 NYS2d 410 [2d Dept 1994], *lv denied* 85 NY2d 921, 627 NYS2d 319, *cert denied* 516 US 914, 116 S Ct 301 [1995]; *Matter of Entertainment Partners Group v Davis*, 198 AD2d 63, 603 NYS2d 439 [1st Dept 1993]). New York's anti-SLAPP statutes, Civil Rights Law §§ 70-a and 76-a, were enacted to protect citizens from litigation intended to chill the rights to participate in public processes, to free speech, and to free association, "particularly where such rights are exercised in a public forum with respect to issues of public concern" (L. 1992, ch 767; *see Southampton Day Camp Realty, LLC v Gorman*, 118 AD3d 976, 990 NYS2d 30 [2d Dept 2014]; *Singh v Sukhram*, 56 AD3d 187, 866 NYS2d 267 [2d Dept 2008]; *Hariri v Amper*, 51 AD3d 146, 854 NYS2d 126 [1st Dept 2008]; *see also 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 137 n 1, 589 NYS2d 825 [1992], *cert denied* 508 US 910, 113 S Ct 2341 [1993]). By his first counterclaim, Porcelain seeks to recover, among other things, legal fees, costs, and punitive damages under Civil Rights Law § 70-a.

Burton v Porcelain
Index No. 5606/2019
Page 5

Initially, the court notes that in November 2020, while these motions were sub judice, the Legislature amended Civil Rights Law §§ 70-a and 76-a (*see* L. 2020, ch 250) to broaden the protection afforded private citizens by, among other things, expanding the definition of a SLAPP suit to include a claim based on “any communication in a place open to the public or a public forum in connection with an issue of public interest” or “any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest,” and by defining “public interest” to mean “any subject other than a purely public matter” (Civil Rights Law § 76-a [1] [a]; *see Mable Assets, LLC v Rachmanov*, 192 AD3d 998, 146 NYS3d 147 [2d Dept 2021]). Although state and federal courts have determined that the amendments to Civil Rights Law §§ 70-a and 76-a should be given retroactive effect (*see e.g. Sweigert v Goodman*, __ F Supp 3d __, 2021 WL 1578097 [SD NY, Apr. 22, 2021]; *Palin v New York Times Co.*, __ F Supp 3d __, 2020 WL 7711593 [SD NY, Dec. 29, 2020]; *Sackler v American Broadcasting Cos., Inc.*, 71 Misc 3d 694, 144 NYS3d 529 [Sup Ct, NY County 2021]), the arguments on Burton’s application pursuant to CPLR 3211 for dismissal of the first counterclaim will be assessed under the former provisions, as the parties have not raised the applicability of the new legislation; for the reasons set forth below, the court finds that the allegations in the counterclaim are sufficient to withstand dismissal even under the former, more restrictive definition (*see Mable Assets, LLC v Rachmanov*, 192 AD3d 998, 146 NYS3d 147).

Former Civil Rights Law § 76-a (1) (a) defined an “action involving public petition and participation” as “an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to the efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.” A “public applicant or permittee” was defined as “any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body” (Former Civil Rights Law § 76-a [1] [b]). Thus, under the former law, an action qualified as a SLAPP lawsuit if it sought damages, was brought by a public permittee, and was materially related to a defendant’s efforts to “‘comment on’ or ‘oppose’ such permission” (*Dynamic Energy Solutions, LLC v Pinney*, 387 F Supp 3d 176, 183 [ND NY 2019], quoting *Gills Farm v Darrow*, 256 AD2d 995, 997, 682 NYS2d 306 [3d Dept 1998]).

Moreover, under former Civil Rights Law § 70-a (1),

[a] defendant in an action involving public petition and participation . . . may maintain an action . . . or counterclaim to recover damages, including costs and attorney’s fees, from any person who commenced or continued such action . . . [if such action] was commenced without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law

To state an anti-SLAPP counterclaim, “a SLAPP-suit defendant must ‘identify . . . the application or permit being challenged or commented on,’ and his [or her] communications must have been ‘substantially related to such application or permit’” (*Bridge Capital Corp. v Ernst*, 61 AD3d 496, 496, 877 NYS2d 51 [1st Dept], *lv denied* 12 NY3d 715, 884 NYS2d 691 [2009]).

Burton v Porcelain
Index No. 5606/2019
Page 6

Burton incorrectly asserts that the first counterclaim must be dismissed because it does not allege she is a public applicant or permittee, and her lawsuit does not involve public petition or participation on the part of defendant. Here, the allegations in support of the first counterclaim are sufficient for purposes of Civil Rights Law § 76-a (1) (b), as they identify Burton as a “public applicant or permittee” in that, as an attorney in private practice, she must obtain government permission—namely, annual recertification—to remain a member of the AFC panel (*see Edwards v Martin*, 158 AD3d 1044, 72 NYS2d 606 [3d Dept 2018]; *Street Beat Sportswear, Inc. v National Mobilization Against Sweatshops*, 182 Misc 2d 447, 698 NYS2d 820 [Sup Ct, NY County 1999]). “The defining aspect of a public application or petition, is that it is a required government process that must be satisfied to perform some task” (*Chandok v Klessig*, 648 F Supp 2d 449, 460 [ND NY 2009], *aff’d* 632 F3d 803 [2d Cir 2011]). Further, the allegations in the answer that Porcelain sent the correspondence and email communications that are the subject of the complaint, and that such communications were “materially related” to his efforts to comment on Burton’s work as an AFC and to challenge her continued permission to remain on the AFC panel, are sufficient to meet the “action involving public petition and participation” element of Civil Rights Law §§ 70-a (1) and 76-a (1) (a) (*see Edwards v Martin*, 158 AD3d 1044, 72 NYS2d 606; *see also Southampton Day Camp Realty, LLC v Gormon*, 118 AD3d 976, 990 NYS2d 30; *T.S. Haulers v Kaplan*, 295 AD2d 595, 744 NYS2d 193 [2d Dept 2002]). The branch of Burton’s motion seeking dismissal of Porcelain’s anti-SLAPP counterclaim is, therefore, denied.

Porcelain’s second counterclaim sounding in abuse of process, however, is dismissed. Abuse of process has four essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, (3) use of the process in a perverted manner to obtain a collateral objective, and (4) special damages (*Curiano v Suozzi*, 63 NY2d 113, 480 NYS2d 466 [1984]; *Board of Educ. of Farmingdale Union Free Sch. Dist. v Farmingdale Classroom Teachers Assn., Local 1889 AFT, AFL-CIO*, 38 NY2d 397, 380 NYS2d 635 [1975]). “[T]he institution of a civil action by summons and complaint is not legally considered process capable of being abused” (*Curiano v Suozzi*, 63 NY2d at 116, 480 NYS2d 466). Porcelain’s argument that the second service of the summons and complaint, which took place on the same day as the first service by a different process server (who purportedly said to Porcelain “I know where your son plays baseball”), is insufficient to state a cause of action for abuse of process (*Sipsas v Vaz*, 50 AD3d 878, 855 NYS2d 248 [2d Dept 2008]; *Leon v Couri*, 285 AD2d 493, 727 NYS2d 639 [2d Dept 2001]). Moreover, Burton’s explanation that the second service was the result of having to hire two separate process servers to find and serve Porcelain before the deadline for service is reasonable under the circumstances in light of service having taken place less than 30 days before expiration of the statutory deadline (*see* CPLR 306-b).

Porcelain’s third counterclaim asserts that Burton is in violation of Judiciary Law § 487, because the complaint in this action contains false and misleading allegations against him. Judiciary Law § 487 imposes civil and criminal liability on any attorney who “(1) [i]s guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party; or, (2) [w]illfully delays his client’s suit with a view to his own gain” (Judiciary Law § 487; *Betz v Blatt*, 160 AD3d 696, 74 NYS3d 75, 79 [2d Dept 2018]; *see Gumarova v Law Offs. of Paul A. Boronow, P.C.*, 129 AD3d 911, 12 NYS3d 187 [2d Dept 2015]). Contrary to Porcelain’s contentions, Judiciary Law § 487 only applies to an attorney who is acting in his or her capacity as an attorney; it does not apply to a party who is represented by counsel and who happens to be an attorney (*Oakes v Muka*, 56 AD3d 1057, 1058, 868 NYS2d 796 [3d Dept 2008]). Here,

Burton v Porcelain
Index No. 5606/2019
Page 7

the alleged defamatory statements by Burton were made in support of her claims in this action, and were not made by Burton in her capacity as an attorney. Accordingly, Porcelain's claim pursuant to Judiciary Law § 487 fails, since "the mere fact that a wrongdoer is an attorney is insufficient to impose liability" (*Crown Assoc., Inc. v Zot, LLC*, 83 AD3d 765, 768, 921 NYS2d 268 [2d Dept 2011]; *People v Canale*, 240 AD2d 839, 841, 658 NYS2d 715 [3d Dept 1997]; see also *Oakes v Muka*, 56 AD3d 1057, 1058, 868 NYS2d 796 [noting that Judiciary Law § 487 "applies to an attorney acting in his or her capacity as an attorney, not to a party who is represented by counsel and who, incidentally, is an attorney"]). Porcelain's third counterclaim, therefore, is dismissed.

Porcelain's fourth counterclaim seeks to recover damages for defamation. To state a cause of action for defamation, a plaintiff must allege that the defendant published a false statement to a third party, without privilege or authorization, and with fault as judged by, at a minimum, a negligence standard, which caused either special harm or constituted defamation per se (see *Emby Hosiery Corp. v Tawil*, __ AD3d __, 2021 NY Slip Op 04214 [2d Dept 2021]; *Rodriguez v Daily News, L.P.*, 142 AD3d 1062, 37 NYS3d 613 [2d Dept 2016]; *Brady v Gaudelli*, 137 AD3d 951, 27 NYS3d 205 [2d Dept 2016]; *Epifani v Johnson*, 65 AD3d 224, 882 NYS2d 234 [2d Dept 2009]). "Special damages contemplate the loss of something having economic or pecuniary value" (*Liberman v Gelstein*, 80 NY2d 429, 434-435, 590 NYS2d 857 [1992] [citations omitted]). A statement is defamatory per se if it "(1) charges the plaintiff with a serious crime; (2) tends to injure the plaintiff in her or his trade, business or profession; (3) imputes that the plaintiff has a loathsome disease; or (4) imputes unchastity to a woman" (*Laguerre v Maurice*, 192 AD3d 44, 50, __ NYS3d __ [2d Dept 2020]; see *Liberman v Gelstein*, 80 NY2d 429, 590 NYS2d 857). "When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven" (*id.* at 435, 590 NYS2d 857). Whether particular statements are defamatory per se is considered a question of law (*Geraci v Probst*, 15 NY3d 336, 344, 912 NYS2d 484 [2010]).

Further, CPLR 3016 (a) provides "[i]n an action for slander or libel, the particular words complained of shall be set forth in the complaint [or counterclaim], but their application to the plaintiff may be stated generally." In interpreting the statute, the courts require both "that the defamatory words be set forth in haec verba" (*Conley v Gravitt*, 133 AD2d 966, 968, 520 NYS2d 672 [3d Dept 1987]; see *Erlitz v Segal, Liling & Erlitz*, 142 AD2d 710, 530 NYS2d 484 [2d Dept 1988]; *Monsanto v Electronic Data Sys. Corp.*, 141 AD2d 514, 529 NYS2d 512 [2d Dept 1988]; *Gardner v Alexander Rent-A Car, Inc.*, 28 AD2d 667, 280 NYS2d 595 [2d Dept 1967]), and that the time, place and manner, as well as the person or persons to whom such publication was made, be set forth in the complaint (*Kismo Apts., LLC v Rivera*, 180 AD3d 1033, 119 NYS3d 519 [2d Dept 2020]; *CSI Group, LLP v Harper*, 153 AD3d 1314, 61 NYS3d 592 [2d Dept 2017]; *Epifani v Johnson*, 65 AD3d 224, 233, 882 NYS2d 234). A cause of action for defamation which fails to comply with these special pleading requirements must be dismissed (see *CSI Group, LLP v Harper*, 153 AD3d 1314, 61 NYS3d 592; *Varela v Investors Ins. Holding Corp.*, 185 AD2d 309, 586 NYS2d 272 [2d Dept 1992], *aff'd* 81 NY2d 958, 598 NYS2d 761 [1993]). Here, Porcelain does not allege special damages, and the only alleged defamatory statement set forth verbatim in the fourth counterclaim—that he engaged in "illegal activities"—does not constitute defamation per se (see *Crane-Hogan Structural Sys., Inc. v Belding*, 142 AD3d 1385, 38 NYS3d 489 [4th Dept 2016]; *Cammarata v Cammarata*, 61 AD3d 912, 878 NYS2d 163 [2d Dept 2009]; cf. *Liberman v Gelstein*, 80 NY2d 429, 590 NYS2d 857; *Epifani v Johnson*, 65 AD3d 224, 882 NYS2d 234). Accordingly, the fourth counterclaim is dismissed.

Burton v Porcelain
Index No. 5606/2019
Page 8

The court turns next to that branch of Burton's motion to have Porcelain's answer with counterclaims stricken on the basis that it violates the pleading requirements of CPLR 3014 and CPLR 3024 (a) and (b). CPLR 3014 provides that a pleading shall consist of plain and concise statements in consecutively numbered paragraphs containing, as far as is practicable, a single allegation (*Panagouloupoulos v Ortiz*, 143 AD3d 791, 38 NYS3d 807 [2d Dept 2016]; *Lawrence v Talbot*, 62 AD2d 1012, 403 NYS2d 559 [2d Dept 1978]; *Weissglass v Weissglass*, 52 AD2d 582, 382 NYS2d 534 [2d Dept 1976]). CPLR 3024 (a) provides that a party may move for a more definite statement if a pleading is so vague or ambiguous that a party cannot reasonably be expected to respond to it, and CPLR 3024 (b) allows that a party may move to strike scandalous or prejudicial matter unnecessarily inserted into a pleading.

Porcelain's answer with counterclaims begins with a lengthy recitation of extraneous material before addressing the 85 numbered paragraphs of the complaint in three paragraphs of run-on sentences that continue for pages, setting forth a series of denials, factual averments, and opinions. It is unclear to the court exactly what is being admitted or denied. Accordingly, Porcelain is directed to serve an amended answer that clearly and concisely sets forth his responses to plaintiff's complaint, omitting material that is extraneous or non-responsive to the claims at issue (*Lawrence v Talbot*, 62 AD2d 1012, 403 NYS2d 559; *Weissglass v Weissglass*, 52 AD2d 582, 382 NYS2d 534; *Russo v Advance Publications, Inc.*, 33 AD2d 1025, 307 NYS2d 916 [2d Dept 1970]). The amended answer shall bear the correct caption, as required by CPLR 2101 (c), and shall be filed and served within twenty (20) days after service of a copy of this order with notice of its entry.

Finally, Porcelain's cross motion for sanctions is denied. Pursuant to Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1 (b), sanctions may be imposed against a party or the party's attorney for frivolous conduct. "Conduct is frivolous if . . . it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" (*Matter of Congregation Ahavas Moische, Inc. v Katzoff*, 134 AD3d 934, 934, 20 NYS3d 895 [2d Dept 2015]). "The decision of whether to award sanctions and the amount or nature of those sanctions is generally entrusted to the trial court's sound discretion" (*Matter of Khan-Soleil v Rashad*, 111 AD3d 727, 728, 974 NYS2d 798 [2d Dept 2013]). Here, the court finds Porcelain has not clearly demonstrated that Burton's conduct was intended to harass or maliciously injure him.

Any application not specifically addressed in this order is deemed denied.

Dated: July 22, 2021



ANDREW A. CRECCA, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION