

Levai v Marlborough Gallery Inc.
2022 NY Slip Op 30440(U)
February 4, 2022
Supreme Court, New York County
Docket Number: Index No. 654419/2021
Judge: Barry Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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MAX LEVAI,

Plaintiff,

- v -

MARLBOROUGH GALLERY INC., STANLEY N. BERGMAN, and FRANZ PLUTSCHOW,

Defendants.

-----X

Table with 2 columns: INDEX NO. (654419/2021), MOTION DATE, MOTION SEQ. NO. (001)

DECISION + ORDER ON MOTION

HON. BARRY R. OSTRAGER

Before the Court is Motion Sequence 001 by defendants to dismiss the complaint. This case is related to Marlborough Gallery Inc v. Max Levai et al., Index No. 654459/2020, in which it is alleged that Max Levai and others engaged in self-interested misconduct as employees of the Gallery, including self-dealing and engaging in sham transactions at under market prices for the benefit of themselves. Plaintiff Max Levai has filed a complaint against Marlborough Gallery asserting that Marlborough Gallery and the other defendants engaged in wrongdoing against plaintiff. These two cases will be consolidated for all pre-trial purposes.

At the pre-answer motion to dismiss stage of this case, this Court must determine only whether the facts as alleged by plaintiff Max Levai, assuming they are true and affording plaintiff the benefit of every possible favorable inference, fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). Based on the papers submitted, Motion Sequence 001 to dismiss the complaint is granted in part and denied in part as set forth below.

Count 1 for Defamation is dismissed as duplicative of Count 2.

The motion to dismiss Count 2 for defamation per se is denied. Plaintiff adequately pleads the elements of defamation, including special damages. The letters (and, by extension, the allegedly oral defamatory statements made to non-parties Tom Otterness and Ahmed Alsoudani) sufficiently impugn plaintiff's integrity in his occupation/business/trade because they impute dishonesty and misconduct of plaintiff's professional reputation. The letters are reasonably susceptible to a defamatory meaning if the contents of the letter are untrue. Regarding defendants' argument that plaintiff failed to sufficiently plead that the allegedly defamatory statements were privileged, defendants may raise that issue as an affirmative defense in the Answer.

However, Count 2 is dismissed to the extent the claim is based on alleged oral defamatory statements to the George Rickey Estate, Richard Estes, the Estate of Beverly Peppers, Tom Sanchez, and Robert Rupin. These claims are not supported by any factual allegations and were not made with the requisite specificity.

Count 3 for Common Law Unfair Competition is dismissed as duplicative of plaintiff's claims for defamation, conversion, and tortious interference.

Count 4 for Unfair Competition under New York General Business Law § 349 is dismissed because the facts alleged do not support such a claim. To sustain a claim under § 349, plaintiff must show (1) that defendants' challenged act or practice was consumer-oriented, (2) that defendant's conduct was misleading in a material way, and (3) that plaintiff suffered an injury as a result of defendants' the deceptive act. *Stutman v. Chemical Bank*, 95 N.Y.2d 24, 29 (2000). The purpose of the Act is to protect against wrongs directed against the consuming public. *Oswego Laborers' Local 214 Pension Fund et al. v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 24 (1997). Here, the alleged wrong—that defendants knowingly made false

statements to actual and potential customers of plaintiff in order to divert business from him—does not meet the requirements of the statute because the alleged wrong was not directed at the general public. Plaintiff cannot argue that the complained-of conduct (defamation) is directed at the general public. *See Genesco Entertainment v. Koch*, 593 F.Supp. 743, 752. At most, it is alleged that the alleged defamatory statements were directed at plaintiff and a handful of others.

The motion to dismiss Count 5 for tortious interference with actual and prospective business relations is denied. Because the alleged tortious interference was with prospective business relations, Plaintiff was required to assert an independent tort, which he has done. Plaintiff has adequately pled the existence of prospective business relationships with non-parties Tripoli, Patterson, Otterness, and Alsoudani, and that defendants interfered with these prospective business relationships by allegedly defaming plaintiff, thereby injuring plaintiff's reputation and causing the breakdown of potential business relationships.

The motion to dismiss Count 6 for conversion is denied. Plaintiff has sufficiently alleged that he has a possessory interest in an Instagram account, which is concededly intangible property. Plaintiff has sufficiently alleged that defendants have taken dominion over the Instagram account that has value to plaintiff in derogation of plaintiff's rights. Plaintiff has therefore sufficiently alleged that this particular Instagram account—as opposed to all Instagram accounts—is the type of intangible property that can be subject to a conversion claim. *Cf. Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 292–93 (2007); *see also Salonclick LLC v. Superego Mgmt. LLC*, 2017 WL 239379 at *10 (S.D.N.Y. Jan 18, 2017).

The motion to dismiss Counts 7 (Replevin) and 8 (Trespass to Chattels) is denied. Plaintiff has sufficiently alleged facts necessary to support these causes of action.

The motion to dismiss Count 9 for breach of an implied contract is denied as premature. Plaintiff has adequately alleged the elements of an implied-in-fact contract, including mutual assent. The existence of the “no oral modification” clause in the expired contract is not enough to warrant dismissal of the claim in this case because factual issues exist as to whether defendants waived this clause by modifying the original employment contract without putting it to writing.

The motion to dismiss Count 10 for quantum meruit is denied as premature. Accepting plaintiff’s facts as true, the elements of quantum meruit (performance of service in good faith, acceptance of service by defendant, plaintiff’s expectation of compensation, and reasonable value for the service) are sufficiently pled. Defendants’ argument that plaintiff did not have a reasonable expectation of compensation is a question of fact that cannot be decided on a motion to dismiss. *Moors v. Hall*, 143 A.D.2d 336, 338 (1988).

Count 11 for declaratory judgment is dismissed as duplicative of the breach of contract claim.

Count 12 for a permanent injunction is dismissed. A permanent injunction is a remedy, not a cause of action. Further, the remedy of a permanent injunction is duplicative of the money damages sought for the defamation claim, the tortious interference claim, and the conversion claim.

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is denied as to Counts Five, Six, Seven, Eight, Nine, and Ten, granted in part as to Count Two, and granted as to Counts One, Three, Four, Eleven, and Twelve, and those claims are severed and dismissed;

ORDERED that defendants shall answer the remaining claims within 20 days of the date of this decision and order;

ORDERED that counsel shall meet and confer to agree upon the terms of a Preliminary Conference Order using the form available on the Part 61 website and e-file it with a cover letter by March 14, 2022; and it is further

ORDERED that all counsel shall appear on April 1, 2022, at 2:00 p.m., for a status conference for both this case and the related case. The appearance will be via Microsoft Teams. The parties are directed to e-file a Joint Appearance Sheet by March 14, 2022.

Dated: February 4, 2022

Barry R. Ostrager

BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<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