

Hammond v Equinox Holdings LLC
2022 NY Slip Op 30909(U)
March 22, 2022
Supreme Court, New York County
Docket Number: Index No. 155061/2019
Judge: Paul A. Goetz
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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STEVEN HAMMOND,

Plaintiff,

- v -

EQUINOX HOLDINGS LLC, EQUINOX WALL STREET, INC., MICHAEL ALEXANDER

Defendant.

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INDEX NO. 155061/2019

MOTION DATE 12/08/2021

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 232

were read on this motion to/for DISMISSAL.

In this defamation action, plaintiff, a former member of Equinox Gym, moves pursuant to CPLR 3211 to dismiss defendant Michael Alexander’s counterclaim for abuse of process. Defendant Alexander cross-moves pursuant to CPLR 3211(a)(7) to dismiss the complaint.

With regard to plaintiff’s motion to dismiss the counterclaim, “[a]buse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective” (Curiano v. Suozzi, 63 N.Y.2d 113, 116 [1984]). Further, “the gist of the action for abuse of process lies in the improper use of process after it is issued” (Williams v. Williams, 23 N.Y.2d 592, 569 [1969]). Here, defendant does not allege that, after plaintiff filed this lawsuit, plaintiff used the lawsuit “to gain an advantage collateral to its legitimate ends” (Bonarco, Ltd. v. Cossington Overseas, 269 A.D.2d 158, 158-59 [1st Dep’t 2000] [holding that Russian court’s restraining order on plaintiff’s sale of stock was insufficient to support abuse of process claim]; I.G. Second Generation, 17 A.D. at 207-08 [stating that there was no indication

that “process” was perversely utilized by defendants where defendants in prior action sought declaration that they were entitled to possession of the subject premises which relief was entirely appropriate and not collateral to defendants’ objective of securing an exclusive right to the premises]). Moreover, the allegation that plaintiff was motivated by malice and hatred in bringing the action is insufficient to give rise to a cause of action for abuse of process (*I.G. Second Generation*, 17 A.D.3d at 207). Accordingly, the counterclaim will be dismissed. However, the request for sanctions is denied as the counterclaim was not patently frivolous.

Turning to the cross-motion, plaintiff argues that the motion cannot be considered because it is untimely. However, under CPLR 3211(e), a motion under CPLR 3211(a)(7) can be made at any time, even after the answer is filed. Therefore, the cross-motion will be considered on the merits.

With regard to the defamation cause of action, the cause of action must be dismissed to the extent it is based on the publications alleged in paragraphs 65, 68 and 102-107. These allegations are deficient because they fail to allege *in haec verba* the particular defamatory words used by defendant (*BCRE 230 Riverside LLC*, 59 A.D.3d 282, 283 [1st Dep’t 2009] [holding that “words to the effect” that defendant had been tossing urine and other fluids and objects from the terrace of his apartment were insufficient to satisfy the particularity requirements of CPLR 3016]; *Simpson v. Cook Pony Farm Real Estate*, 12 A.D.3d 496, 497 [2d Dep’t 2004] [holding that statements to colleagues regarding defendant’s dissatisfaction with plaintiff’s software and indicating that plaintiff stole listings from defendant were insufficient because plaintiffs “did not set forth actual words complained of”]; *Wadsworth v. Beaudet*, 267 A.D.2d 727, 729 [3d Dep’t 1999] [holding that allegations that defendant told pizzeria customers that plaintiff had stolen money from them fails to comply with CPLR 3016 that “the defamatory words be set forth *in*

haec verba”). However, to the extent that the defamation claim is based on the statements alleged in paragraphs 28 and 29, the claim is sufficient because these paragraphs state directly the particular words complained of. Moreover, to the extent that this particular statement may be protected by the common interest privilege, plaintiff has sufficiently alleged that defendant made the statement with actual malice (Complaint, paragraph 45) and thus the claim cannot be dismissed on this basis (*Lieberman v. Gelstein*, 80 N.Y.2d 429, 437-438 [1992]).

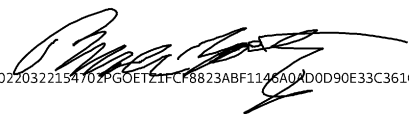
With regard to the claim for intentional infliction of emotional distress, this claim must be dismissed as defendant’s alleged report to his supervisor and the reporting of the story to a newspaper is insufficient to rise to the level of extreme and outrageous conduct, such as a campaign of intimidation and harassment, which is necessary to sustain this claim (*see Dennis v. Napoli*, 148 A.D.3d 446, 446 [1st Dep’t 2017] [holding that plaintiff stated claim for intentional infliction of emotional distress where plaintiff alleged that after defendant wife discovered that plaintiff was having an affair with her husband, defendant husband authorized the wife’s access to plaintiff’s work e-mail account and social media file account in an effort to harass and defame plaintiff]; *Eves v. Ray*, 42 A.D.3d 481, 483 [2d Dep’t 2007] [holding that evidence established that plaintiff engaged in campaign of harassment and intimidation sufficient to support claim where plaintiff threatened the defendant both physically and financially and stalked him in an effort to intimidate defendant during his legal representation of the plaintiff’s former wife]; *Mitchell v. Giambruno*, 35 A.D.3d 1040 [3d Dep’t 2006] [holding that there was sufficient evidence to support plaintiffs’ claim where neighbors conducted a campaign of lewd comments and intimidation against same-sex couple, including constructing two mock grave sites]; *Cavallaro v. Pozzi*, 28 A.D.3d 1075, 1078 [4th Dep’t 2006] [holding that defendant’s campaign of harassment and intimidation, including threatening to kill plaintiff and his children, met the

requisite level of outrageousness]). Likewise, plaintiff’s claim for negligence must be dismissed as there is no allegation that defendant Alexander caused plaintiff physical injury (*Davies v S.A. Dunn & Co.; LLC*, 200 AD3d 8, 16 [1st Dept 2021] [observing “[t]o recover in negligence, a plaintiff must sustain either physical injury or property damage resulting from the defendant’s alleged negligent conduct.”]).

Accordingly, it is

ORDERED that plaintiff’s motion to dismiss is granted and the counterclaim is dismissed; and it is further

ORDERED that defendant’s cross-motion is granted to the extent that defamation claim is dismissed insofar as it is premised on any allegations except for those contained in paragraphs 28 and 29 of the complaint, and the claims for intentional infliction of emotional distress and negligence are dismissed.


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3/22/2022
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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