Castro v Kensington Ins. Co.
2022 NY Slip Op 31651(U)
May 18, 2022
Supreme Court, New York County
Docket Number: Index No. 652205/2020
Judge: Frank P. Nervo
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART IV
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ANGEL A. CASTRO, III,

Plaintiff,

—against—

KENSINGTON INSURANCE COMPANY, AHMUTY DEMERS & McMANUS, LAW OFFICES OF MICHAEL E. PRESSMAN, GLENN KAMINSKA, and STEVEN H. COHEN,

Defendants
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Index No. 652205/2020

DECISION AND ORDER
Mot. Seq. No. 001

FRANK P. NERVO, J:

This matter having been recently reassigned to Part IV:

Plaintiff is an attorney who had been initially retained by Jose B. Cruz (CRUZ) to represent him in a personal injury claim resulting from a dog bite against parties to be known herein as the Hidalgo defendants (*see* Queens County Index No. 715056/2016.) Before the resolution of that matter in Queens County, CRUZ substituted plaintiff with other counsel.

Plaintiff alleges, in the instant matter, a panoply of bases why the defendants are at fault for his having been fired by Mr. Cruz, and plaintiff's loss of concomitant legal fees.

Plaintiff instituted these claims against the insurer for the Hidalgo defendants, Kensington Insurance Company, and their attorneys, Ahmuty, Demers and McManus and Glenn Kaminska, Esq, and the attorneys that represented the Hidalgo defendants in the dog bite action, Law Office of Michael E. Pressman and Steven H. Cohen, Esq.

Defendants move to dismiss this action for an array of reasons. For clarity, the Court addresses each of plaintiff's claims and defendants' bases for dismissal of same, in turn.

As with all motions to dismiss under CPLR § 3211, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*see e.g. Leon v. Martinez*, 84 NY2d 83 [1994]). "Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.*; citing *Heaney v. Purdy*, 29 NY2d 157 [1971]).

CPLR § 3211(a)(5), provides for dismissal of one or more causes of actions under the doctrine of collateral estoppel. The doctrine precludes a party from

re-litigating, in subsequent actions, those issues which have been raised in a prior proceeding and decided against said party and has been characterized as "a narrower species of res judicata" (*Ryan v. New York Telephone Co.*, 62 NY2d 494, 500 [1984]). "What is controlling is the identity of the issue which has necessarily been decided in the prior action" (*id.*). Put differently, the issue must be "material to the first action... and essential to the decision rendered thererin" and the issue "must be the point actually to be determined in the second action ... such that 'a different judgment in the second would destroy or impair rights or interest established by the first'" (*id.* at 500-01 quoting *Schuylkill Fuel Corp v. Nieberg Realty Corp.*, 250 NY 304, 307 [1929]). "The estoppel is limited ... to the point actually determined" (*Schuylkill Fuel Corp v. Nieberg Realty Corp.*, 250 NY at 307). It is beyond cavil that collateral estoppel may only be asserted against a party who has had a fair and full opportunity to litigate the issue (*Ryan v. New York Telephone Co.*, 62 NY2d 494); and "the essential prerequisite is fairness" (*Jeffreys v. Griffin*, 301 AD2d 232 [1st Dept 2002]).

To the extent that the motion seeks dismissal under § 3211(a)(7), it is likewise afforded the benefits of liberal construction, a presumption of truth, and any favorable inference (*id.*; *Anderson v. Edmiston & Co.*, 131 AD3d 416, 417 [1st Dept 2015]; *Askin v. Department of Educ. of City of N.Y.*, 110 AD3d 621, 622 [1st

Dept 2013]). The motion must be denied if from the four corners of the pleadings "factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]). A complaint should not be dismissed so long as, "when the plaintiff's allegations are given the benefit of every possible inference, a cause of action exists," and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Proj., Inc. v. Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]). However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v. Bergreen*, 173 AD2d 220 [1st Dept 1991]).

Defamation. Plaintiff points to no false statement. The statements referenced constitute defendants' submissions of plaintiff's own text messages to a Court. Additionally, the defendants' statements are privileged as made in the course of judicial proceedings. Prior to the institution of this matter, plaintiff's communication and interactions, particularly with respect to the Hidalgo matter, were judicially determined to be unconscionable by Supreme Court, Queens County (*see* decision and order of Janice A. Taylor, J.S.C. May 22, 2020, Index No. 715056/2016). Consequently, defendants' statements that

plaintiff acted unconscionably are true, and plaintiff is estopped from re-litigating whether his actions were unconscionable (*Ryan v. New York Telephone Co.*, 62 NY2d 494, 500 [1984]; *Schuylkill Fuel Corp v. Nieberg Realty Corp.*, 250 NY 304, 307 [1929]). Furthermore, and as a separate basis for dismissal, the statute of limitations has passed. Consequently, plaintiff's causes of action for defamation are dismissed.

Abuse of process. This Court can discern no facts alleged which constitute an abuse of process by defendants. Indeed, the process engaged in by defendants, wherein they sought the vacatur of a purported settlement agreement obtained by plaintiff from parties he did not represent, resulted in the determination they sought, to wit: vacatur of that agreement and the preservation of the legal rights of the defendants Hidalgo in the Queens County case brought by CRUZ. This Court discerns no fraud or deception in any of the actions, at any time, of the defendants in the representation of Kensington Insurance Company, the Hidalgo defendants, or themselves. Consequently, this claim is dismissed.

Tortious interference with contract. Plaintiff points to no evidence demonstrating that defendants interfered with his retainer by Mr. Cruz. While

it may well be that defense counsel, in the course of representing their respective clients, demonstrated deficiencies, missteps and/or ethical violations in the course of plaintiff's representation of CRUZ, such does not give rise to any of the allegations raised in this complaint, including claims for "tortious interference with contract". Stated another way, there are no facts alleged, nor is there anything in the record to indicate, CRUZ discharged plaintiff at the urging of defendants or to any benefit of the defendants, intentional or otherwise. In an affidavit dated December 5, 2020 (NYSCEF Doc. No. 380 of Queens County Index No. 715056/2016), CRUZ sets forth a number of bases for his discharge of plaintiff, none of which reference any defendant in this matter. Consequently, plaintiff's claims of tortious interference with contract are dismissed.

General Business Law § 349. The allegations fail to demonstrate the applicability of General Business Law § 349, which requires proof of some deceptive or unlawful business act or practice. This claim is, therefore, dismissed.

Conspiracy. Plaintiff cites no facts sufficient to establish a conspiracy claim. To the extent the defendants cooperated with each other to establish

insurance coverage and a defense for the Hidalgo defendants in the Supreme Court, Queens County action, such cooperation fails to establish a conspiracy but, rather, the effective and proper legal representation that was warranted the Hidalgo defendants, as well as the preservation of due process for all parties in that matter.

While the plaintiff alleges the defendants "knowingly participated in the furtherance of the plan to defame [him] for the purpose of covering up the wrongdoing of Kensington, Kaminska, and ADM" causing damage to plaintiff, the Court finds no factual basis for same is established. As a further basis for dismissal, the statute of limitations has expired.

To the extent that plaintiff cross-moves for leave to amend the complaint and to disqualify defense counsel such relief is denied as palpably without merit.

CONCLUSION

The Court has considered all plaintiff's factual allegations as true, as warranted on any motion to dismiss. The legal conclusions urged by the plaintiff are, however, uniformly without merit, constraining the Court to

dismiss this matter in its entirety. None of the facts alleged fit into any cognizable, or statutorily viable, legal theory.

It is, therefore,

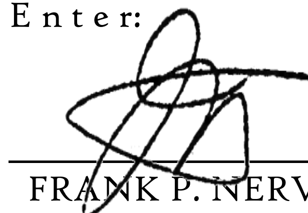
ORDERED this complaint is dismissed in its entirety, without costs (costs not having been sought by movants); and it is further

ORDERED that the matter shall be marked disposed.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

New York, New York
May 18, 2022

E n t e r:



FRANK P. NERVO,
Justice Supreme Court