

Sara Tirschwell for Mayor, Inc. v Kramer

2022 NY Slip Op 33279(U)

September 30, 2022

Supreme Court, New York County

Docket Number: Index No. 154123/2021

Judge: Sabrina Kraus

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SABRINA KRAUS **PART** **57TR**

Justice

-----X

SARA TIRSCHWELL FOR MAYOR, INC., SARA
TIRSCHWELL

Plaintiff,

INDEX NO. 154123/2021

MOTION DATE 09/20/2022

MOTION SEQ. NO. 001

- v -

STEVE KRAMER D/B/A GET OUTTHE VOTE,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56

were read on this motion to/for

DISMISS

BACKGROUND

Plaintiffs commenced this action alleging breach of contract against defendant whom they hired to collect the signatures needed to get Sara Tirschwell (ST) on the June 22, 2021, Republican mayoral primary ballot in New York City. Defendant has counterclaimed for defamation.

PENDING MOTIONS

On August 23, 2022, defendant moved for an order dismissing the First Amended Verified Complaint pursuant to CPLR §3211(a)(7).

On September 20, 2022, plaintiffs cross-moved for an order dismissing defendant's counterclaim pursuant to CPLR §3211(a)(7). On that date, the motions were fully briefed, marked submitted, and the court reserved decision.

For the reasons stated below, defendant's motion is denied, and plaintiff's cross-motion is granted.

ALLEGED FACTS

Defendant is in the field of electoral campaigning and he does business advising campaigns as "Get Out The Vote."

ST decided to run for Mayor of New York and in February 2021, retained defendant to collect the signatures needed to get on the June 22, 2021, Republican mayoral primary ballot. For the 2021 election, it took a petition with 2,250 qualified signatures to get on the primary ballot. To be valid signatures that counted, the signatories had to meet certain qualifications, such as being registered Republican voters who resided in New York City and who did not sign anyone else's nominating petition. The signatures also needed to be witnessed under oath by another New York registered Republican New York State voter. NY Election Law § 6-132(2). Because, invariably, a number of signatures get disallowed by the Board of Elections, it is necessary to create a cushion by obtaining more than the minimum required number of signatures.

Pursuant to a written contract the parties agreed on a target of 6,200 signatures at a price of \$80,000.

The period for gathering Designating Petition signatures for the June 22, 2021 Republican Primary election began on March 1, 2021 and the last day to file those petition signatures was March 25, 2021. Due to the on-going COVID-19 pandemic, the usual petitioning period of 38 days was shortened to 24 – and signatures totals were reduced from 3,750 to 2,250, in order to qualify for the ballot as a candidate for Mayor.

Defendant obtained 4,454 signatures, of which all but 546 were deemed invalid by the New York City Board of Elections. Plaintiffs allege that in at least one instance, defendant had a statutorily unqualified person collecting signatures and solicited a signature gatherer to falsely state under oath that he had witnessed signatures he did not in fact witness.

In a letter dated April 14, 2021, James E. Tyrell, III, Esq., a partner with the law firm, Venable, LLP, Counsel to Sara Tirschwell for Mayor, Inc., wrote to Kramer demanding a full refund of the \$80,000 paid; in addition to the \$4,482.03 expended by the Campaign to purchase a Republican voter list.

Mr. Tyrell expressed a desire to resolve the dispute without resorting to litigation, however he also stated if the demand was not met ST would be forced to explore formal legal action, and inform the public that her absence from the Republican primary ballot is directly and solely attributable to defendant's "pitiful performance in collecting her petition signatures."

On April 19, 2021, plaintiffs retained Kokhba Law and, in an e-mail dated, April 20, 2021, Daniel Kokhba, Esq., wrote to defendant asserting that he had "been instructed to file a Summons and Complaint in the New York State Supreme Court, New York County seeking compensatory and punitive damages unless defendant refunding the \$84,482.03 by April 27, 2021. Kokhba further alleged that if the offer was not accepted a public complaint would be filed detailing the allegations and further alluded to pursuing additional remedies if it was determined defendant's conduct was deliberate.

Soon after the complaint was filed, the New York Post published a story alleging that defendant sabotaged plaintiffs' campaign, and did not take ST seriously because she was a woman. The next day, April 30, 2021, ST posted a link to the story on her "twitter" account with the following description, "@kanyewest looks like Steve Kramer is a gold digger."

DISCUSSION

On a motion to dismiss for failure to state a cause of action, the court must afford the pleadings a liberal construction, accept the facts alleged as true, and give the plaintiffs the benefit of every possible favorable inference. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994). The test to be applied is whether the complaint gives sufficient notice of the transactions, occurrences, intended to be established and whether the facts as alleged fit within any cognizable legal theory. *Id.*

“The essential elements of a breach of contract cause of action are ‘the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of his or her contractual obligations, and damages resulting from the breach.’” (*Canzona v. Atanasio*, 118 A.D.3d 837, 838, quoting *Dee v. Rakower*, 112 A.D.3d 204, 208-209).

Defendant argues that plaintiff has not alleged any direct financial injury, and has thus failed to allege damages resulting from the breach, that plaintiffs have failed to adequately allege special or consequential damages and that the allegations in the complaint are contradicted by documentary evidence.

Plaintiffs argue the damages she alleges in the complaint are reliance damages, and that the campaign incurred expenses totaling at least \$426,149.33 which would not have been incurred without an expectation that defendant would have performed under the contract and that plaintiffs would, therefore, be on the Republican ballot.

The court finds that the amended complaint does adequately allege the elements for breach of contract and notes further on a motion to dismiss whether plaintiffs can ultimately establish their allegation is not part of the calculus. *Magee-Boyle, et al., v. Reliastar Life Insurance Company of New York, et al.*, 173 A.D.3d 1157, 1159 (2d Dept. 2019).

Based on the foregoing, defendant's motion to dismiss for failure to state a cause of action is denied.

Plaintiff's Motion to Dismiss the Counterclaim For Defamation Is Granted

Defamation is “the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society” (*Foster v. Churchill*, 87 N.Y.2d 744, 751 [1996]).

In order to prove a claim for defamation, plaintiff must establish a false statement that is published to a third party without privilege or authorization and that plaintiff is caused harm, unless the statement is one of the types of publications actionable regardless of harm (*see Dillon v. City of New York*, 261 A.D.2d 34, 38 [1st Dept.1999]).

The allegations of which Kramer complains are all opinions “or “[l]oose, figurative or hyperbolic statements, [which] even if deprecating . . . are not actionable.” *Dillon v City of N.Y.*, 261 A.D.2d 34, 38 (1st Dept 1999). *Accord, Kaye v. Trump*, 58 A.D.3d 579, 580 (1st Dept 2009); *Chalpin v. Amordian Press*, 128 A.D.2d 81, 84 (1st Dept 1987) (describing plaintiff as “unbelievably unscrupulous character,” even if defamatory, is “the sort of subjective moral evaluation” that is opinion); *Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807 (Sup Ct. N.Y. Co. 2005) (statements by disgruntled consumer that plaintiff is a “crooked company,” has “been ripping off its contract holders,” has committed “fraud,” reflect opinion about quality of company's services).

Moreover, even if such statements had been actionable, the fact that they were made in a pleading renders them absolutely privileged.

Statements made by parties and their attorneys in the context of litigation are absolutely privileged if, by any view or under any circumstances, they are pertinent to the litigation” (*Grasso v. Mathew*, 164 A.D.2d 476, 479 [3d Dept. 1991], *lv. dismissed* 77 N.Y.2d 940 [1991], *lv. denied* 78 N.Y.2d 855 [1991]).

Kramer argues that the privilege was destroyed because the underlying lawsuit was a sham action brought solely to defame defendant. [*see eg Napoli v. Bern*, 2018 N.Y. Slip Op. 51193(U); *Flomenhaft v. Finkelstein*, 127 A.D.3d 417, 418 [1st Dept. 2015]).

The court does not find that there is any basis to label either the original complaint or the amended complaint a sham lawsuit but rather finds that plaintiff alleges she paid for services that were not properly rendered.

Based on the foregoing, the counterclaim for defamation is dismissed.

WHEREFORE it is hereby:

ORDERED that defendant’s motion to dismiss the amended verified complaint for failure to state a cause of action is denied and plaintiffs’ cross-motion to dismiss the counterclaim for defamation is granted; and it is further

ORDERED that defendant shall interpose an answer to the amended complaint within twenty days of the date of this order; and it is further

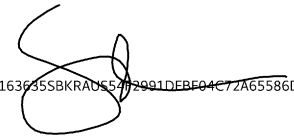
ORDERED that, within 20 days from entry of this order, plaintiffs shall serve a copy of this order with notice of entry on the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.



202209301636355BKRAUS5472991DEBE04C7ZA65586D85F8AB6FF

9/30/2022

DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE