Cold Spring Advisory Group, LLC v National Sec. Corp.
2023 NY Slip Op 31163(U)
April 13, 2023
Supreme Court, New York County
Docket Number: Index No. 158387/2022
Judge: Mary V. Rosado
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARY V. ROSADO** — ***Justice*** — **PART** **33M**

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COLD SPRING ADVISORY GROUP, LLC,

Plaintiff,

- v -

NATIONAL SECURITIES CORPORATION, B. RILEY FINANCIAL INC.

Defendant.

---X

INDEX NO. 158387/2022

MOTION DATE 11/28/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 44, 45, 46, 47, 59, 61
were read on this motion to/for DISMISSAL.

Upon the foregoing documents, Defendant National Securities Corporation's ("Moving Defendant" or "National") motion to dismiss Plaintiff Cold Spring Advisory Group, LLC's ("Plaintiff" or "Cold Spring") Complaint pursuant to CPLR §§ 3211(a)(1), (a)(4), and (a)(7) is granted.

I. Factual and Procedural Background

Plaintiff initiated this action on September 29, 2022 alleging malicious prosecution (NYSCEF Doc. 1). Plaintiff's business reviews losses in brokerage accounts, and in the event they believe their broker's malfeasance caused the loss, they recommend attorneys to account holders to recover those losses (*id.* at ¶ 2). National was a brokerage firm (*id.* at ¶ 4). In 2014, National commenced an action in Supreme Court, New York County (*see National Securities Corp. v Cold Spring Advisory Group, LLC, et al.*, index number 653483/2014) (the "Underlying Action").

In the Underlying Action, National alleged that Cold Spring improperly obtained confidential proprietary information belonging to National and utilized that information to

encourage National customers to initiate arbitrations against National (*id.* at ¶¶ 17-18 and 21). National also alleged in the Underlying Action that Cold Spring interfered with National's business relationships by communicating negligent or intentionally false statements to customers to induce those customers to file lawsuits against National (*id.* at ¶ 24). Cold Spring alleges that National voluntarily discontinued the Underlying Action with prejudice, and that such voluntary discontinuance constituted a termination of the proceedings on the merits (*id.* at ¶¶ 104-05).

Cold Spring further alleges that National had no information to support the allegations it made in the Underlying Action, had no probable cause to initiate the Underlying Action, and that Cold Spring has suffered special injury. Cold Spring provided a list of twenty potential customers who it alleges had agreed to pay Cold Spring a total of $226,500.00 (*id.* at ¶ 57). However, after learning about the Underlying Action, Cold Spring alleges those twenty customers decided not to sign retainers (*id.* at ¶ 58).

On November 16, 2022, National responded to Cold Spring's Complaint with the instant pre-answer motion to dismiss (NYSCEF Doc. 6). National argues a variety of reasons why the Complaint should be dismissed (NYSCEF Doc. 25). First, National argues that Cold Spring cannot, as a matter of law, show that the prior action was terminated in its favor as required to state a malicious prosecution claim (*id.*). National also argues that to the extent it agreed in the stipulation of discontinuance not to raise as a defense to a future malicious prosecution claim that the proceedings did not terminate in Cold Spring's favor, this Court is not bound by the parties' stipulation as to legal issues.

National also asserts that Cold Spring has failed to adequately plead special injurys, as the loss of possible business does not constitute special injury. National further claims that even if Cold Spring did plead special injury, it fails to allege National was the cause of that special injury

as it has already alleged in several other lawsuits that other parties defamation of Cold Springs was the cause of their lost business. National argues that Cold Spring should be judicially estopped from making inconsistent factual allegations in different judicial forums. National further states that Cold Spring had lost its business license for two years, and since it was barred by law from soliciting new business, National could not be the cause of Cold Spring's alleged special injury.

National also argues that Cold Spring has failed to establish in its pleadings the absence of probable cause in commencing the Underlying action. National argues that while Cold Spring has stated National lacked probable cause, it has done so in only conclusory terms.

Finally, National asserts Cold Spring's Complaint should be dismissed pursuant to CPLR § 3211(a)(4), which provides that if another action is pending between the same parties for the same cause of action arising out of the same alleged wrongs, then the Complaint should be dismissed.

Cold Spring filed its opposition on November 29, 2022 (NYSCEF Doc. 47). Cold Spring argues that pursuant to the stipulation entered into discontinuing the Underlying Action, National cannot now argue that the prior case did not terminate in its favor. Cold Spring also argues that it is not judicially estopped from claiming here that National's lawsuit damaged its business merely because it has alleged in other lawsuits that other entities' allegedly defamatory statements also damaged Cold Spring's business. Cold Spring further asserts that it has sufficiently pled the elements of malicious prosecution to withstand the instant pre-answer motion to dismiss. Finally, Cold Spring argues that since no other action is presently pending before the parties, National's CPLR § 3211(a)(4) argument is without merit.

On December 13, 2022, National filed its reply (NYSCEF Doc. 61). National again stresses that Cold Spring has failed to allege special injury, has failed to plead the prior action terminated in its favor, and has failed to shown the absence of probable cause.

II. Discussion

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give a plaintiff the benefit of all favorable inferences which may be drawn from the pleadings (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

A claim for malicious prosecution requires proof of each of (1) the commencement or continuation of a proceeding by the defendant against the plaintiff, (2) the termination of the

proceeding in favor of the plaintiff, (3) the absence of probable cause for the proceeding and (4) actual malice (*Facebook, Inc. v DLA Piper LLP (US)*, 134 AD3d 610, 613-614 [1st Dept 2015]). A plaintiff also must plead special injury (*Engel v CBS, Inc.*, 94 NY2d 195, 201 [1999]). It has long been held that "[m]alicious prosecution claims are not encouraged, and thus, without a clear and satisfactory showing that plaintiffs in the previous action lacked reasonable grounds, the case would be dismissed" (*id.* citing *Ferguson v Arnow*, 142 NY 580, 584-585 [1894]).

While verifiable loss of business may satisfy this requirement, "the loss of one client, along with vague allegations of reputational loss" are not sufficient (*id.* at 207). The First Department has further specified that for special damages arising out of lost business to exist, there must be specific individuals who terminated their business relationship because of the allegations in the underlying action (*Wilhelmina Models, Inc. v Fleisher*, 19 AD3d 267).

Here, Plaintiff has failed to sufficiently plead special injury. Plaintiff alleges that it "lost a significant amount of business exceeding $2.5 million from, upon information and belief, [because] over 215 potential customers as a result [of the underlying action] declined to enter into a contract with [Plaintiff]" (NYSCEF Doc. 1 at ¶ 56). The Complaint then alleges that "Plaintiff has confirmed that the twenty customers had agreed to retain it and to pay to plaintiff retainers totaling $226,500.00" but upon learning of the underlying action, "did not sign the retainer agreements which they previously stated they would sign" (*id.* at ¶¶ 57-58).

These allegations fail as a matter of law because, even accepting them as true, none of the individuals ever entered a retainer agreement with the Plaintiff and therefore Plaintiff has failed to show any individuals who terminated their business relationship. Indeed, Plaintiff has only shown a loss of possible business. The Court of Appeals has held that an allegation of a "potential client among possible others" who are "dissuaded from hiring" a plaintiff is insufficient to constitute

special injury (*Engel v CBS, Inc.*, 93 NY2d 195, 200 [1999]). This is precisely what Plaintiff here is alleging as its special injury.

As National points out, Plaintiff has also initiated numerous defamation actions against other defendants claiming it was their actions that ruined Plaintiff's reputation and caused them to lose business. Moreover, Plaintiff did not even have a valid license to do business in its state of incorporation for numerous years and could not have taken on clients even if they did sign retainers. Finally, Plaintiff's own website indicates that a client relationship does not begin with its firm until a retainer is signed (*see* NYSCEF Doc. 24). Thus, not only are Plaintiff's allegations regarding special injury insufficient as a matter of law, even if lost *potential* business constituted special injury, the loss is flatly contradicted by documentary evidence pulled from the public record. Because all elements of malicious prosecution must be sufficiently pled to survive a motion to dismiss, and the Court has determined that Plaintiff has failed to sufficiently plead special damages, the Court need not address the remainder of Defendant's arguments.

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Accordingly, it is hereby,

ORDERED that Defendant National Securities Corporation's motion to dismiss Plaintiff Cold Spring Advisory Group, LLC's Complaint is granted; and it is further

ORDERED that within ten days of entry, counsel for Defendant National Securities Corporation shall serve a copy of this Decision and Order, with notice of entry, on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

4/13/2023		Mary V Rosado JSC
DATE		HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	x	CASE DISPOSED			NON-FINAL DISPOSITION		
	x	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE