

Hes v Zirkin

2023 NY Slip Op 32817(U)

August 11, 2023

Supreme Court, New York County

Docket Number: Index No. 155457/2022

Judge: Lori S. Sattler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LORI S. SATTLER PART 02TR

Justice

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JOEY HES,

Plaintiff,

- v -

ADAM ZIRKIN, SAMANTHA ZIRKIN

Defendant.

INDEX NO. 155457/2022

MOTION DATE N/A, 05/23/2023

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 45, 46, 47, 48, 55, 56, 57, 59

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 50, 51, 52, 53, 54

were read on this motion to/for STRIKE PLEADINGS

In this tort action, Defendant Adam Zirkin ("A.Z.") moves by Notice of Motion (Motion Sequence 004) for an Order dismissing the Amended Verified Complaint of Plaintiff Joey Hes ("Plaintiff") pursuant to CPLR 3211, or in the alternative, for an Order striking allegations from the Amended Complaint pursuant to CPLR 3024(b). Plaintiff failed to file opposition on the March 28, 2023 due date or any time before the motion was submitted. Instead, approximately two months after submission of the motion, Plaintiff filed a purported cross motion seeking permission to file a Second Amended Complaint. The filing contained only a Notice of Cross Motion without any supporting affirmations, affidavits, or exhibits. The Court finds that an untimely cross motion filed without any supporting documentation, and especially without a copy of the proposed Amended Complaint, is insufficient to serve as opposition to a motion. Accordingly, the Court will treat the motion as unopposed.

Defendant Samantha Zirkin (“S.Z.”) moves by Notice of Motion (Motion Sequence 005) for an Order striking various paragraphs, headings, quotations and exhibits in the Amended Complaint as specified in her counsel’s affidavit pursuant to CPLR 3024(b). There is no opposition to the motion. The motions are consolidated for disposition.

The Amended Complaint in this action can only be described as a rambling 69-page document with 120 pages of annexed exhibits. Notably, it contains quotes from *The Great Gatsby* as well as Gary Kasparov. It is difficult to discern from the 287 paragraphs why certain information is relevant to the causes of action.

According to the Amended Complaint (NYSCEF Doc. No. 39), Plaintiff and A.Z. attended middle and high school together and had overlapping social circles. Plaintiff states that she was aware that A.Z. had separated from his wife S.Z. and she began dating him in January 2019 at a time when S.Z. lived on the West Coast. A.Z. ended the relationship in July or August of 2019. The events surrounding the end of the relationship are unclear, although the Complaint devotes a large portion of its allegations to S.Z.’s actions and the reasons she purportedly caused A.Z. and Plaintiff’s breakup.

Plaintiff alleges that she reached out to A.Z.’s close friends and his sister in late July and early August 2019 to discuss her purported concerns about A.Z.’s wellbeing. She attaches all of these communications as exhibits to the Complaint, which show that Plaintiff initiated these conversations and that they primarily focused on S.Z. and how her purported actions were hurting A.Z. and Defendants’ children. Plaintiff asserts that the exchanges demonstrate that people in their lives have negative things to say about S.Z. In another exhibit, Plaintiff submits a screenshot of an October 2019 comment that she made on A.Z.’s Venmo account in response to a payment A.Z. made to his sister-in-law that stated “[A.Z.] are you back out there dating others

or still tending to a wife who said she was [omitted]? Remember why you had to break up with me. . . oh wait the story no longer suits you.” Shortly thereafter, A.Z. and S.Z. reported Plaintiff to the police and Plaintiff was subsequently arrested and charged with stalking and aggravated harassment. The charges were dismissed in August 2021 (NYSCEF Doc. No. 48).

Plaintiff asserts four causes of action: intentional infliction of emotional distress (“IIED”), defamation, false arrest, and malicious prosecution. A.Z. seeks dismissal of the IIED, defamation, and false arrest causes of actions as time barred. He further seeks dismissal of the malicious prosecution cause of action for failure to state a claim.

Statute of Limitations (MS 004)

A.Z. moves to dismiss asserting that the action was commenced more than one year after the purported claims occurred and that the statute of limitations has run on the Plaintiff’s false arrest, IIED, and defamation causes of action because each has a one-year statute of limitations (CPLR § 215[3]).

Where there is a common law claim for false arrest, the claim accrues on the date that the plaintiff is released from custody (*McQueen v City of New York*, 209 AD3d 469 [1st Dept 2022]). Plaintiff was arrested on November 18, 2019. This action was commenced by the filing of a Summons and Complaint on June 28, 2022, and service was acknowledged on July 22, 2022, approximately two and a half years later. Accordingly, the cause of action for false arrest is untimely and is dismissed as against A.Z.

To the extent that an IIED or defamation claim occurred before June 28, 2021, it is time barred (*Smulyan v N.Y. Liquidation Bur.*, 158 AD3d 456, 457 [1st Dept 2018]; *Ofer v Mercy Med. Ctr.*, 171 AD3d 502, 503 [1st Dept 2019]). Nowhere in the lengthy Amended Complaint does Plaintiff allege a specific date when her claims accrued, although she appears to allege that

S.Z. and A.Z. went to the police in or around October 2019. It would appear that any actions that might be the basis for a claim occurred well before June 28, 2021. Accordingly, the third cause of action for IIED and the fourth cause of action for defamation are dismissed as to A.Z.

Malicious Prosecution (MS 004)

A.Z. also moves to dismiss Plaintiff's malicious prosecution cause of action. He asserts that the claim must be dismissed as Plaintiff does not meet the elements required to sustain a cause of action. He contends that even were this Court to accept Plaintiff's allegations as true, Plaintiff fails to allege with particularity whether the underlying criminal proceeding was terminated in her favor or that A.Z. acted with malice. He further contends that there was probable cause for the criminal proceeding and that Plaintiff does not demonstrate special damages, which also warrants dismissal of the claim.

Plaintiff contends that she has been the subject of a malicious prosecution and that her documentation annexed to the Amended Complaint supports her claim. She asserts that Defendants joined together and lied about her "to cover up their own lifestyle choices and toxic family life" and there was no probable cause for her prosecution as it was based on Defendants' "knowing and intentional fabrications" (Amended Complaint ¶¶ 235, 260). She further claims that Defendants' actions were undertaken out of malice and for the specific purpose of damaging and inflicting pain and suffering on her.

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "the allegations in the complaint are to be afforded liberal construction, and the facts alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable inference and determining only whether the facts alleged fit within any cognizable legal theory" (*M&E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). Such a

motion must be denied “if the factual allegations contained within the four corners of the pleading manifest any cause of action cognizable at law” (*id.*). However, “factual allegations which fail to state a viable cause of action” or “that consist of bare legal conclusions, or that are inherently incredible or unequivocally contradicted by documentary evidence, are not entitled to such consideration” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

It has been held that there is a “heavy burden on malicious prosecution plaintiffs, requiring that they establish four elements” (*Smith-Hunter v Harvey*, 95 NY2d 191, 195 [2000]). Those elements are (1) the commencement or continuation of a criminal proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the accused, (3) the absence of probable cause for the criminal proceeding and (4) actual malice (*Broughton v State*, 37 NY2d 451, 456 [1975]). A plaintiff’s failure to prove any one of these elements will defeat the entire claim (*Brown v Sears Roebuck & Co.*, 297 AD2d 205, 208 [1st Dept 2002]). To that end, the Court has recognized that “accusers must be allowed room for benign misjudgments” (*Smith-Hunter*, 95 NY2d at 195). A finding that an action was brought with actual malice requires that it be brought with “conscious falsity” (*Wilhelmina Models, Inc. v Eric Fleisher*, 19 AD3d 267, 270 [1st Dept 2005]).

A.Z. concedes that there was a criminal proceeding brought against Plaintiff due to Defendants having filed complaints with the police. However, A.Z. contends that Plaintiff did not state with particularity that the proceedings were terminated in her favor. The Amended Complaint states that she rejected offers for an adjournment in contemplation of dismissal in the case. Plaintiff maintains that she wanted her day in court rather than agree to any outcome that indicated that she was guilty. Ultimately, Plaintiff claims that she made a motion to dismiss, that several counts were dismissed, and that later the remaining counts were dropped. Plaintiff

provides no explanation for the basis of the dismissal. The Certificate of Disposition (NYSCEF Doc. No. 48) submitted by A.Z. shows that, contrary to Plaintiff's assertions, earlier charges were dismissed first because they were superseded by other charges and that the subsequent charges were dismissed pursuant to a motion to dismiss. In this instance, Plaintiff does not plead with specificity the basis for dismissal such that a determination may be made whether the action was terminated in her favor, the Court finds that the second element of a malicious prosecution claim is not met, requiring dismissal of this cause of action. Even if the Court were to find that this element of the malicious prosecution claim was met, the action would still be dismissed as against A.Z. for the reasons set forth below.

“A necessary element of the cause of action for malicious prosecution is ‘actual malice’” (*Nardelli v Stamberg*, 44 NY2d 500, 502 [1978] [citations omitted]). Here, although Plaintiff repeatedly states that Defendants acted with malice, the Amended Complaint makes only vague and conclusory allegations about A.Z. It claims that he joined S.Z. in a conspiracy to instigate a criminal prosecution against Plaintiff and that they adopted one another's lies in statements to the police in an attempt to mislead police and prosecutors. These allegations are nothing but conclusory statements which are inherently incredible when read in conjunction with the documentation that Plaintiff herself submits with her Amended Complaint. For instance, despite Plaintiff's contention that A.Z. engaged in a lengthy campaign to fabricate evidence against her by complaining about numerous phone calls she claims to have never made, there is ample documentary evidence annexed to her Amended Complaint that indicates that much of what Defendants told the police about Plaintiff's communications had some basis in truth. These exhibits indicate that Plaintiff did contact some of A.Z.'s friends and his sister to discuss S.Z. and Defendants' marriage and that she did make an inappropriate comment on his Venmo

account in response to his sending money to his sister-in-law. Plaintiff's exhibits also show that she did contact S.Z. after the breakup, told S.Z., in effect, that she knew where Defendants' children went to school, and broached the possibility of the children transferring schools. These communications were made after A.Z. sought to end his relationship with Plaintiff. Here it cannot be found that "defendant must have commenced the prior criminal proceeding due to a wrong or improper motive, something other than a desire to see the ends of justice served" (Restatement, Torts, § 668; Prosser, Torts, [4th ed] § 119) or that Defendants commenced the criminal proceeding with conscious falsity. Accordingly, and in the absence of opposition, the cause of action for malicious prosecution is dismissed as against A.Z.

Motion to Strike (MS 005)

S.Z. moves for an Order striking various paragraphs, headings, quotations and exhibits in the Amended Complaint. She notes that the Amended Complaint is an "extraordinary document" of 189 pages including exhibits which "reads like a screen play for a soap opera" and is "scandalous, caustic, and melodramatic" (NYSCEF Doc. No. 51). The Court concurs that much of the material contained in the Amended Complaint is extraneous and serves as a vehicle for Plaintiff to assert sensational material that serves no purpose in the instant proceeding. The Court finds that all exhibits except for A, B, D, and E shall be stricken and that the following paragraphs shall be stricken from the Amended Complaint: 2, 3, 4, 9, 15, 16, 17, 18, 19, heading, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, heading, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, heading, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 82, 83, 84, 85, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 103, 104, 105, 106, heading, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 120, 122, 123, 124, 125, 126, 127, 128, 129, heading, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141,

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Accordingly, it is hereby:

ORDERED that this action is dismissed as to defendant Adam Zirkin and it is further

ORDERED that the motion for an order striking scandalous matter is granted to the extent set forth herein and Plaintiff shall, within 10 days from service of a copy of this order with notice of entry, serve an amended complaint that shall not include the matter set forth above; and it is further

ORDERED that the defendant Samantha Zirkin shall serve an answer to the amended complaint or otherwise respond thereto within 20 days of service of such pleading.

This constitutes the Decision and Order of the Court.

8/11/2023
DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE