

Lembert v Ruto

2023 NY Slip Op 35067(U)

December 22, 2023

Supreme Court, Queens County

Docket Number: Index No. 710852/2022

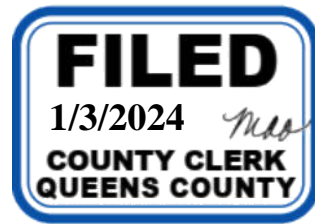
Judge: Nicole McGregor Mundy

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY



Present: HON. NICOLE McGREGOR MUNDY
Acting Justice

IA PART 7

SYLVIA LEMBERT, x

Plaintiff,

Index

Number 710852/2022

-against-

Motion

Date May 22, 2023

PATRICK RUTO,

Motion Seq. 004

Defendant.

x

The following papers numbered EF47-EF76 read on this motion by defendant for an order granting summary judgment in defendant's favor, dismissing the Complaint against him.

	<u>Papers Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF47-EF59
Aff in Opp -Exhs.....	EF60-EF67
Reply Affirmation.....	EF68-EF76

Upon the foregoing papers it is Ordered that the motion by defendant is determined as follows:

Plaintiff brings this action against defendant Patrick Ruto (Ruto), a process server, alleging five causes of action: abuse of process (First cause of action); fraud (Second cause of action); intentional infliction of emotional distress (Third cause of action); negligent infliction of emotional distress (Fourth cause of action); and defamation (Fifth cause of action). This action stems from an underlying action entitled *Abissi v Lember* (Sup. Ct., Dutchess County, Index No. 2018-35812), which involved an attorney seeking to recover \$78,389.70 in legal fees incurred while representing plaintiff in relation to a divorce action. The attorney was represented by Stephen Santoro, Esq. (Santoro).

Santoro hired Ruto to effect service of process upon Lembert. The record demonstrates that Ruto served Lembert with a Summons and Complaint on December 10, 2018. It is undisputed that plaintiff defaulted in the legal fees action, and judgment was entered against her. Lembert subsequently moved to vacate the default and a traverse hearing was scheduled in Dutchess County Supreme Court. However, the matter was resolved by stipulation¹ and the traverse hearing was not held. Plaintiff, then self-represented, subsequently commenced the instant action against Ruto.

Initially, Ruto maintains that the aforementioned stipulation resolved all issues related to service of process in the underlying action. As to the causes of action asserted against him in this action, Ruto maintains that plaintiff cannot establish her claims.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence sufficient to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Viviane Etienne Medical Care, P.C. v. Country-Wide Insurance Co.*, 25 NY3d 498 [2015]). Once the movant has demonstrated a prima facie showing of entitlement to judgment, the burden shifts to the party opposing the motion to produce admissible evidentiary proof sufficient to establish the existence of a material issue of fact which requires a trial of the action (*see, Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Alvarez v. Prospect Hosp.*, supra; *Leto v. Feld*, 131 AD3d 590 [2d Dept 2015]). It is long and well-established that a party opposing summary judgment must “assemble, lay bare and reveal their proofs, in order to show that the matters set up in his complaint are real and are capable of being established upon a trial” (*Nel Taxi Corp. v Eppinger*, 203 AD2d 438 [2d Dept 1994]; and *see Hoot Group v Kaplan*, 9 AD3d 448 [2d Dept 2004]).

With regard to the First cause of action, the elements of a cause of abuse of process are: (a) the issuance of process; (b) an intent to do harm without excuse of justification; and, (c) use of that process in a perverted manner to obtain a collateral objective (*see, Tenore v Kantrowitz, Goldhamer & Grafman, P.C.*, 76 AD3d 556, 557 [2d Dept 2010]; and *see, Influx Capital, LLC v Pershin*, 186 AD3d 1622 [2d Dept 2022]). “The gist of the tort is ‘the improper use of process after it is issued’ by ‘an unlawful interference with one’s person or property’” (*Tenore v Kantrowitz, Goldhamer & Grafman, P.C.*, 76 AD3d 556, 557 [2d Dept 2010]). Here, defendant demonstrated entitlement to judgment on plaintiff’s cause of action for abuse of process by establishing that these elements are not present inasmuch as Ruto only served the Summons and Complaint; he did not issue it. Moreover, Ruto demonstrated that he had no other objective in serving the Summons and Complaint than to collect his fee. In opposition, plaintiff’s rambling allegations against Ruto are without merit and fail to meet the shifted

¹ The stipulation was placed on the record, and the transcript was So Ordered by the presiding Judge.

burden of a party opposing a summary judgment motion to produce admissible evidentiary proof sufficient to establish the existence of a material issue of fact (see, *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]; *Luckey v. Bauch*, 17 AD3d 411 [2005]), inasmuch as the mere commencement of an action, which Ruto did not do, does not constitute abuse of process and, plaintiff does not allege that defendant interfered with plaintiff's person or property rights after the issuance of process (*Tenore v Kantrowitz, Goldhamer & Grafman, P.C.*, 76 AD3d 556, 557 [2d Dept 2010]; *Williams v Williams*, 23 NY2d 592).

With regard to the Second cause of action, the essential elements of a cause of action sounding in fraud are "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]; see *Chung v. Wang*, 79 AD3d 693 [2d Dept 2010]; see *RBE Northern Funding, Inc. v. Stone Mountain Holdings, LLC*, 78 AD3d 807 [2d Dept 2010]). Here, defendant met his burden of establishing entitlement to judgment on this cause of action by demonstrating that plaintiff makes no allegation of any inducement or reliance by her on any representation or omission made by Ruto, and thus failed to satisfy the specificity and particularity requirement of CPLR §3016[b] (*Barclay Arms, Inc. v. Barclay Arms Association*, 74 NY2d 644). Moreover, her allegations as to Ruto's alleged fraudulent actions with regard to his actions as a process server in general are factually unsupported, in that attorney affirmations, alone, lack probative value in opposition to a motion for summary judgment (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The attorney affidavit and pleadings submitted are also rendered irrelevant as they relate to other actions and do not establish any fraud in this action.

With regard to the Third cause of action, the elements of a claim for intentional infliction of emotional distress are The elements of intentional infliction of emotional distress are "(1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress (*Klein v Metropolitan Child Services*, 100 AD3d 708, 710 [2d Dept 2012]; see *Andrews v Bruk*, 220 AD2d 376, 376, 631 NYS2d 771 [1995]). The subject conduct must be " 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community' " (*Klein v Metropolitan Child Services*, 100 AD3d 708, 710 [2d Dept 2012]). Movant defendant met his burden of entitlement to judgment on this claim by demonstrating that nothing in plaintiff's Complaint rises to the level of the requisite elements of "extreme and outrageous conduct" (*Klein v Metropolitan Child Services*, 100 AD3d 708, 710 [2d Dept 2012]). With regard to the Fourth cause of action, "[w]hile physical injury is not a necessary element of a cause of action to recover damages for negligent infliction of emotional distress, such a cause of action must generally be premised upon conduct that unreasonably endangers a plaintiff's physical

safety or causes the plaintiff to fear for his or her own safety" (*Savva v Longo*, 8 AD3d 551 [2d Dept 2004]; *Perry v Valley Cottage Animal Hospital*, 261 AD2d 522 [2d Dept 1999]). Defendant met his burden of establishing entitlement to judgment on the negligent infliction of emotional distress claim by sufficiently showing the absence of any conduct on defendant's part that unreasonably endangered plaintiff's physical safety or caused plaintiff to fear for her own safety (*Savva v Longo*, 8 AD3d 551 [2d Dept 2004]). Plaintiff failed, again, to meet her shifted burden. Plaintiff's opposition papers fail to address either of those branches of defendant's motion seeking to dismiss the claims for intentional infliction of emotional distress and negligent infliction of emotional distress. Furthermore, mere conclusory allegations as to mental distress, without more, and without factual support, are insufficient (*Klein v Metropolitan Child Services*, 100 AD3d 708, 710 [2d Dept 2012]; *Schnur v Balestriere*, 208 AD3d 1117 [1st Dept 2022]; *Roberts v Pollack*, 92 AD2d 440 [1st Dept 1983]).

Finally, plaintiff's opposition also fails to address the branch of defendant's motion for summary judgment on the Fifth cause of action for defamation, and thus failed to overcome defendant's showing of entitlement to judgment as a matter of law with respect to plaintiff's claim for defamation.

In light of the foregoing, defendant's motion for summary judgment is granted in its entirety, and the Complaint is dismissed.

Dated: December 22, 2023



N. McGregor Mundy

 NICOLE MCGREGOR MUNDY
 A.J.S.C.