Grasso v Tristani
2023 NY Slip Op 35070(U)
November 2, 2023
Supreme Court, Richmond County
Docket Number: Index No. 150855/2023
Judge: Wayne M. Ozzi
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

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JOSEPH GRASSO, RIKKI GRASSO, and JOHN GRASSO,

Plaintiffs,

-against-

NINO TRISTANI and ANTHONY TRISTANI, individually and as members of COGENT WASTE SOLUTIONS, LLC, and RAPID FUEL, LLC,

Defendants.

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PART 23

Present:

Hon. Wayne M. Ozzi, J.S.C.

DECISION AND ORDER

Index No. 150855/2023

Motion Seq. No. 001

The Court marked the following papers bearing e-filed numbers 8-21 fully submitted on August 24, 2023:

	E-filed Entries
Notice of Motion (Motion Seq. No. 001) by Defendants, with Exhibits and Supporting Papers (dated June 15, 2023)	8-12
Affirmation in Opposition to Defendants' Motion to Dismiss (Motion Seq. No. 001) by Plaintiffs, with Exhibits (dated July 7, 2023)	14-20
Reply Memorandum of Law in Support of Defendants' Motion to Dismiss (Motion Seq. No. 001) by Defendants (dated July 14, 2023)	21

Defendants, Nino Tristani, Anthony Tristani, Cogent Waste Solutions LLC, and Rapid Fuel, LLC (the "Defendants"), move for an order pursuant to CPLR§ 3211 and CPLR§ 3016, granting their Motion to Dismiss the Complaint. The Plaintiffs, Joseph Grasso, Rikki Grasso,

and John Grasso (the "Plaintiffs"), oppose the Defendants' motion. The Court grants the Defendants' Motion to Dismiss.

FACTS

Cogent Waste Solutions, LLC ("Cogent") employed Joseph Grasso as a manger of sales. Cogent is a domestic limited liability company that operates in the waste carting business. Defendants, Nino Tristani and Anthony Tristani, are the controlling members of Cogent. Nino Tristani and Anthony Tristani are also members of Rapid Fuel, LLC ("Rapid").

Joseph Grasso alleged that he took part in meetings from December 2022 to January 2023, after getting a phone call on December 19, 2022, from an individual named "Steve" who is allegedly known to be associated with organized crime. Steve told Joseph Grasso that he was speaking on behalf of Nino Tristani and Bobby Cipriano (then a Cogent employee) regarding a demand made that Joseph Grasso pay $10,000 because Joseph Grasso had allegedly stolen equipment belonging to Cogent.

The Complaint alleges that Steve told Joseph Grasso that Nino Tristani and Bobby Cipriano had reached out to "Big" John Castellucci, who also allegedly has ties to organized crime. The Defendants deny having any connections to any individuals associated with organized crime.

After receiving the phone call from Steve, Joseph Grasso met with Bobby Cipriano. At that meeting, Joseph Grasso alleges that Bobby Cipriano told Joseph Grasso that he "fucked with the wrong people and you have to pay now whether you like it or not." After this occurrence, Joseph Grasso claimed that he feared for his life and for his family, so he agreed to meet with Bobby Cipriano and "Big" John Castellucci.

At the next meeting, Joseph Grasso asserted that Bobby Cipriano told him that the allegedly stolen goods belonged to Nino Tristani (Bobby Cipriano's employer) and that Nino Tristani had okayed the meeting to extort Joseph Grasso for $10,000. Joseph Grasso claimed that "Cipriano got in my face, standing toe-to-toe and said, you have to pay now."

There were further communications between the Plaintiffs and Nino Tristani that resulted in another meeting that occurred on January 9, 2023, involving Joseph Grasso, Nino Tristani, and Nino Tristani's attorney. After this meeting, on January 19, 2023, Nino Tristani offered Joseph Grasso a compensation package if he agreed to leave Cogent, along with signing a covenant not to compete, a non-disclosure agreement, and a document stating that Nino Tristani had nothing to do with the actions of Bobby Cipriano, Steve, or "Big" John Castellucci. Joseph Grasso refused the offer, and on January 25, 2023, Nino Tristani terminated Joseph Grasso for cause via letter.

Joseph Grasso now alleges that "[t]his whole situation has caused me and my family terrible stress mentally, emotionally, and financially" and that "[he is] afraid to run into the people involved." Additionally, Plaintiffs, John Grasso (the son of Joseph Grasso) and Nikki Grasso (the wife of Joseph Grasso), claim that this situation has caused them fear and to be afraid for their safety and well-being, both physically and emotionally.

On May 5, 2023, the Plaintiffs commenced this action. Plaintiffs' Complaint alleges the Defendants' actions require the imposition of liability against them for assaulting and inflecting intentional emotional distress on the Plaintiffs.

The Defendants now move for an order pursuant to CPLR§ 3211(a)(7), granting their Motion to Dismiss the Complaint. The Plaintiffs have opposed the Defendants' Motion to Dismiss.

DISCUSSION

"In considering a motion to dismiss for failure to state a claim pursuant to CPLR 3211(a)(7), a 'court will 'accept the facts alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory'" *Gould v. Rempel*, 99 AD3d 759, 759-760 (2d Dept 2012) *quoting Nonnon v. City of New York*, 9 NY3d 825, 827 (2007); *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994).

Further, "[o]n a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), 'the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law [,] a motion for dismissal will fail'" *Kopelowitz & Co., Inc. v. Mann,* 83 AD3d 793, 796 (2d Dept 2011) *quoting Guggenheimer v. Ginzburg,* 43 NY2d 268, 275 (1977).

I. ASSAULT

"To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact" *Fugazy v. Corbetta*, 34 AD3d 728, 729 (2d Dept 2006) *quoting Cotter v. Summit Security Services, Inc.,* 14 A.D.3d 475 (2d Dept 2005). The plaintiff must allege imminent apprehension of harmful contact. *Waterbury v. New York City Ballet, Inc.*, 205 AD3d 154, 165-166 (1st Dept 2022). The plaintiff must also allege intent on the part of the defendant to place the plaintiff in imminent apprehension of harmful contact. *Gould*, 99 AD3d at 760.

Further, "[a]n action for an assault need not involve physical injury, but only a grievous affront or threat to the person of the plaintiff" *Gould,* 99 AD3d at 760 *quoting DiGilio v. Burns International Detective Agency*, 46 AD2d 650 (2d Dept 1974). But "words, without some

menacing gesture or act accompanying them, ordinarily will not be sufficient to state a cause of action alleging assault" *Gould*, 99 AD3d at 760. Also, "finger pointing and generalized yelling ... is not the type of menacing conduct that may give rise to a reasonable apprehension of imminent harmful conduct needed to state to an actionable claim of assault" *Berg v. Chelsea Hotel Owner, LLC*, 203 AD3d 484, 486 (1st Dept 2022) *quoting Okoli v. Paul Hastings LLP*, 117 AD3d 539, 540 (1st Dept 2014).

The Defendants claim that the cause of action for assault should be dismissed because the Complaint does not allege there was any display of physical violence or any threatening gestures. Also, the Defendants assert that there are no allegations that Nino Tristani or any of the Defendants engaged in conduct that would cause the Plaintiffs to believe that any physical contact or harm was imminent.

The Plaintiffs reply that the assault cause of action based on Bobby Cipriano's face-to-face, toe-to-toe attempt to extort money from the Plaintiffs is sufficiently pled. The Plaintiffs allege that Joseph Grasso's knowledge of "Big" John Castellucci's organized crime affiliations placed Joseph Grasso in reasonable apprehension of physical harm. The Plaintiffs further allege that Nino Tristani is liable for assault even though he was not present for the alleged threats because he ordered the threat of extortion to be made.

In this case, this Court finds that the Plaintiffs have not sufficiently pled that Joseph Grasso was in imminent apprehension of harmful contact. The assault claims against the Defendants also fail because there is nothing to support the allegation of an intent by the Defendants to place Joseph Grasso in imminent fear. This Court holds that the altercations that occurred between Joseph Grasso and Bobby Cipriano, as alleged, were no more than angry words and generalized yelling involving a dispute over allegedly stolen tools. Also, the

allegations of connections to organized crime as pled, while troubling and unsettling, did not put Joseph Grasso in fear of imminent harmful contact.

II. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

"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" *Davydov v. Youssefi*, 205 AD3d 881, 883 (2d Dept 2022) *quoting Klein v. Metropolitan Child Services, Inc.*, 100 AD3d 708, 710 (2d Dept 2012). "In order to state a cause of action to recover damages for intentional infliction of emotional distress, the pleading must allege 'conduct [that] has been 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'" *Ratto v. Oliva*, 195 AD3d 870, 873 (2d Dept 2021) *quoting Murphy v. American Home Products Corp.*, 58 NY2d 293, 303 (1983).

Additionally, "a deliberate and malicious campaign of harassment or intimidation may, under certain circumstances, be sufficient to meet [the] rigorous standard" *Ratto*, 195 AD3d at 873. But "[m]ere insults, threats, annoyances, or indignities are insufficient" *Davydov*, 205 AD3d at 883. A valid cause of action for intentional infliction of emotional distress will not be found for "threats, annoyances or petty oppressions or other trivial incidents which must necessarily be expected and are incidental to modern life no matter how upsetting" *Ruggiero v. Contemporary Shells, Inc.*, 160 AD2d 986, 987 (2d Dept 1990) *quoting Lincoln First Bank of Rochester v. Barstro & Assoc. Contracting, Inc.*, 49 AD2d 1025, 1025-1026 (4th Dept 1975).

Also, "conclusory assertions are insufficient to set forth a cause of action sounding in the intentional infliction of emotional distress" *Klein*, 100 AD3d at 711.

Last, courts have found that statements made by a defendant that allege a connection to organized crime do not "rise to the level of 'extreme outrageousness' necessary to sustain a cause of action for intentional infliction of emotional distress" *Geller v. Harris*, 258 AD2d 421 (1st Dept 1999).

The Defendants claim that the causes of action for intentional infliction of emotional distress should be dismissed because the Plaintiffs do not allege sufficiently extreme or outrageous conduct and the claims do not allege a causal connection between the alleged conduct and any emotional distress. Next, the Defendants assert that the Plaintiffs have not alleged any emotional distress as a result of the alleged conduct in the Complaint.

The Plaintiffs reply that the claims for intentional infliction of emotional distress should not be dismissed because allegations of extortion are sufficient to state claims for intentional infliction of emotional distress. The Plaintiffs also state that Nino Tristani's alleged use of organized crime members to put the Plaintiffs in fear of physical harm and to economically deprive the Plaintiffs of their way of making a living are sufficient to state of a cause of action for intentional infliction of emotional distress.

In this case, this Court finds that the Plaintiffs have not sufficiently pled a cause of action for intentional infliction of emotional distress because the Plaintiffs have not pled sufficient facts as to whether the conduct was extreme and outrageous. This Court rules that the alleged conduct of Bobby Cipriano was not so outrageous in character or so extreme in degree that the behavior would be considered atrocious and utterly intolerable in a civilized community. Although it is alleged that Bobby Cipriano yelled in Joseph Grasso's face, at close proximity, and said that Joseph Grasso had "fucked with the wrong people", this statement does not rise to the level of

outrageous conduct needed to plead a cause of action of intentional infliction of emotional distress.

Further, there was no deliberate campaign of harassment and intimidation alleged. As noted above, threats alone are not sufficient, and case law holds that statements alleging a connection to organized crime are also not sufficient to plead a cause of action for intentional infliction of emotional distress.

III. RESPONDEAT SUPERIOR/VICARIOUS LIABILITY

"Under the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment" *Browne v. Lyft, Inc.*, 219 AD3d 445, 446 (2d Dept 2023) *quoting N.X. v. Cabrini Medical Ctr.*, 97 NY2d 247, 251 (2002); *Riviello v. Waldron,* 47 NY2d 297, 302 (1979). "Pursuant to this doctrine, the employer may be liable when the employee acts negligently or intentionally, so long as the tortious conduct is generally foreseeable and a natural incident of the employment" *Browne*, 219 AD3d at 446 *quoting Judith M. v. Sisters of Charity Hospital,* 93 NY2d 932, 933 (1999); *Riviello*, 47 NY2d at 304. "An employee's actions fall within the scope of employment where the purpose in performing such actions is to further the employer's interest, or to carry out duties incumbent upon the employee in furthering the employer's business" *Browne*, 219 AD3d at 446 *quoting Montalvo v. Episcopal Health Servs., Inc.,* 172 AD3d 1357, 1359 (2d Dept 2019)." "[T]hose acts which the employer could reasonably have foreseen are within the scope of the employment and thus give rise to

liability under the doctrine of respondeat superior" *Holmes v. Gary Goldberg & Co., Inc.*, 40 AD3d 1033, 1034 (2d Dept 2007).

But vicarious liability will not be sufficiently pled where the torts committed by the employee are "solely for personal motives unrelated to the furtherance of [the employer]" *Elmore v. City of New York*, 15 AD3d 334, 334 (2d Dept 2005) *quoting Kirkman v. Astoria General Hospital*, 204 AD2d 401, 402 (2d Dept 1994). "[W]here an employee's actions are taken for wholly personal reasons, which are not job related, the challenged conduct cannot be said to fall within the scope of employment" *Browne*, 219 AD3d at 446-447 *quoting Montalvo v. Episcopal Health Servs., Inc.,* 172 AD3d 1357, 1360 (2d Dept 2019).

"An act is considered to be within the scope of employment if it is performed while the employee is engaged generally in the business of his [or her] employer, or if his [or her] act may be reasonably said to be necessary or incidental to such employment" *Holmes*, 40 AD3d at 1034 (2d Dept 2007) *quoting Davis v. Larhette*, 39 AD3d 693, 694 (2d Dept 2007) *see also Gallo v. Duggan*, 228 AD2d 376, 377 (1st Dept 1996) (a restaurant could not be held vicarious liable for its bartender's alleged assault upon a patron because the underlying act did not fall within the scope of the bartender's employment).

The Defendants argue that the claims against Cogent and Rapid Fuel should be dismissed because limited liability companies are not liable for the intentional torts of its employees when the alleged conduct was not within the scope of the employee's role at Cogent or Rapid Fuel. Thus, any of the alleged conduct by Bobby Cipriano or Nino Tristani was not within the scope of their employment at Cogent or Rapid Fuel.

Next, the Defendants reason that the claims against Anthony Tristani fail to state a cause of action because Anthony Tristani cannot be held vicariously liable for the conduct of Bobby

Cipriano and Nino Tristani, solely as a member of Cogent and Rapid Fuel. The Defendants explained that Anthony Tristani cannot be held liable simply because he is a member of Cogent and Rapid Fuel as a member of a limited liability company cannot be held liable for the company's obligations by virtue of his status as a member only.

The Plaintiffs argue that they have sufficiently alleged that Nino Tristani, Anthony Tristani, Cogent, and Rapid Fuel are vicariously liable for the alleged tortious acts of Bobby Cipriano. The Plaintiffs assert that employers are vicariously liable for employees who commit an intentional tort that was within his or her scope of employment and that could have been reasonably anticipated by the employer. Last, the Plaintiffs claim that since Nino Tristani and Anthony Tristani are the only members of Cogent and Rapid Fuel, it is not unreasonable to expect that they would be aware of what each other was doing with respect to the limited liability companies and their employees.

Here, the Plaintiffs failed to allege sufficient facts in the Complaint to support their contention that Nino Tristani, Anthony Tristani, Cogent, or Rapid Fuel are vicariously liable for the alleged acts of Bobby Cipriano and Nino Tristani. This Court finds that, as alleged, the Defendants are not vicariously liable for the actions of Bobby Cipriano because the alleged tortious conduct was not foreseeable and was not an incident of employment. As an employee of Cogent, Bobby Cipriano was not charged with collecting debts and Bobby Cipriano's actions were not done in furtherance of Cogent's business. Bobby Cipriano's actions of enlisting supposed organized crime members to collect a debt from Joseph Grasso was not within the scope of his employment. Thus, this Court holds that the Plaintiff's pleading is not sufficient to state a claim for vicarious liability against the Defendants.

IV. PIERCING THE CORPORATE VEIL/ALTER EGO STATUS

Even though the Plaintiffs did not specifically plead that Cogent and Rapid Fuel should be liable for the actions of Bobby Cipriano, this Court will analyze whether the alleged actions of Bobby Cipriano allow for the piercing of the corporate veil of Cogent and Rapid Fuel.

"A member of a limited liability company cannot be held liable for the company's obligations by virtue of his [or her] status as a member thereof" *Grammas v. Lockwood Associates, LLC*, 95 AD3d 1073, 1074 (2d Dept 2012) *quoting Matias v. Mondo Properties LLC*, 43 AD3d 367, 367-368 (1st Dept 2007). "However, a party may seek to hold a member of an LLC individually liable despite this statutory prescription by application of the doctrine of piercing the corporate veil" *Grammas*, 95 AD3d at 1074-1075.

"At the pleading stage, a plaintiff must do more than merely allege that [defendant] engaged in improper acts or acted in bad faith while representing the corporation" *Tabchouri v. Hard Eight Restaurant Company*, 219 AD3d 528, 531 (2d Dept 2023) *quoting Cortlandt St. Recovery Corp. v. Bonderman*, 31 NY3d 30, 47 (2018).

"In order to state a viable cause of action under the doctrine of piercing the corporate veil, the 'plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation [or LLC] and 'abused the privilege of doing business in the corporate [or LLC] form to perpetrate a wrong or injustice'" *Grammas*, 95 AD3d at 1075 *quoting East Hampton Union Free School District v. Sandpebble Builders, Inc.*, 16 NY3d 775, 776 (2011); *Matter of Morris v. New York State Department of Taxation & Finance*, 82 NY2d 135, 142 (1993). "Factors to be considered in determining whether an individual has abused the privilege of doing business in the corporate or LLC form include the failure to adhere to LLC formalities, inadequate capitalization, commingling of assets, and the personal use of LLC funds" *Grammas*, 95 AD3d at 1075.

"Additionally, the corporate veil will be pierced to achieve equity, even absent fraud, when a corporation has been so dominated by an individual or another corporation and its separate entity so ignored that it primarily transacts the dominator's business instead of its own and can be called the other's alter ego" *Tabchouri*, 219 AD3d at 531-532 *quoting Americore Drilling & Cutting, Inc. v. EMB Contracting Corp.*, 198 AD3d 941, 946 (2d Dept 2021). "In determining whether an individual or another corporation constitutes an alter ego, a reviewing court must look for 'overlap in ownership, officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form ... such that one of the corporations is a mere instrumentality, agent and alter ego of the other'" *Tabchouri*, 219 AD3d at 532 *quoting John John, LLC v. Exit 63 Development, LLC*, 35 A.D.3d 540, 541 (2d Dept 2006). "However, evidence of domination in the absence of any wrongdoing or resulting inequity vis-a-vis the plaintiff will not suffice to state a cause of action predicated upon alter ego liability" *Tabchouri*, 219 AD3d at 532.

The Defendants assert that the claims against Cogent and Rapid Fuel fail because limited liability companies are not liable for the intentional torts of their employees.

The Plaintiffs argue that they have sufficiently alleged that Cogent and Rapid Fuel are vicariously liable for the acts of its employees because when an employee commits an intentional tort and the intentional conduct is within the scope of employment, the employer could have reasonably anticipated the tortious conduct.

Here, as noted above, the Plaintiffs must do more than allege that the allegedly improper acts were done while representing the limited liability corporations (Cogent and Rapid Fuel). The Plaintiffs failed to allege sufficient facts in the Complaint to support their contention that Nino Tristani and Anthony Tristani exercised complete control and domination over Cogent and

Rapid Fuel sufficient to pierce the corporate veil. The Complaint also does not allege as to how Nino Tristani and Anthony Tristani used their domination of Cogent and Rapid Fuel to commit any wrongs against the Plaintiffs.

Next, the Complaint also failed to state a cause of action against Cogent and Rapid Fuel in their respective capacities as alleged alter egos of Nino Tristani and Anthony Tristani. The Complaint does not contain any of the necessary facts needed to plead a cause of action alleging that Nino Tristani and Anthony Tristani are the alter egos of Cogent and Rapid Fuel.

Thus, the Court rules the Plaintiffs have not pled sufficient facts to state a cause of action for vicarious liability against any of the Defendants under the theories of piercing the corporate veil or alter ego status of Cogent or Rapid Fuel.

Accordingly, it is hereby:

ORDERED, that Defendants' Motion to Dismiss pursuant to CPLR§ 3211(a)(7) is granted.

The foregoing constitutes the Decision and Order of this Court.

ENTER,

DATED: 11/2/23

Hon. Wayne M. Ozzi, J.S.C.