

**Thomas v Sorokin**

2024 NY Slip Op 32144(U)

June 25, 2024

Supreme Court, New York County

Docket Number: Index No. 652684/2023

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LYLE E. FRANK PART 11M

*Justice*

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AUDREY A THOMAS, THE LAW OFFICE OF AUDREY THOMAS, PLLC

Plaintiffs,

- v -

ANNA SOROKIN,

Defendant.

-----X

INDEX NO. 652684/2023

MOTION DATE 11/22/2023

MOTION SEQ. NO. 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147

were read on this motion to/for DISMISSAL.

Defendant’s prior motion to dismiss was granted in part and defendant was required to answer the remaining claims. Before defendant’s answer was due, plaintiffs served an amended complaint, without leave of Court<sup>1</sup>. Defendant now moves again to dismiss causes of action in the complaint that are duplicative of the claim already dismissed by this Court as well as four newly asserted additional causes of action. Plaintiffs opposed the motion and improperly cross-moved to strike NYSCEF Document numbers 119 and 120. For the reasons set forth below, defendant’s motion to dismiss portions of the complaint is granted and the cross-motion is denied.

Preliminarily, this Court has already dismissed the first, third, and fourth causes of action in its prior decision, plaintiffs has failed to state a claim thus those causes of action remain dismissed. The Court will address each of the new causes of action in turn. The Court notes that

<sup>1</sup> NYSCEF Doc. 51.

counsel for plaintiffs has submitted multiple affirmations in opposition to defendant's motion, however none of the submissions substantively address the legal arguments made by defendant nor advance factual or legal support for the disputed causes of action.

As to plaintiffs' request to strike portions of the NYSCEF record, and refers to those submissions as pleadings, that request is denied. The submissions of counsel were regarding the disputed adjournment requests and are not responsive pleadings. Accordingly, plaintiffs' application is denied.

#### 6th Cause of Action: Conversion

Plaintiffs' complaint alleges that defendant retained funds and failed to pay plaintiffs. Defendant contends that the conversion claim is duplicative of plaintiffs' breach of contract claim thus dismissal is warranted.

A claim for conversion cannot be maintained if it is duplicative of one for breach of contract. See *Peters Griffin Woodward, Inc., v WCSC, Inc and MMT Sales, Inc.*, 88 AD2d 883 [1st Dept 1982]; see also *Retty Financing, Inc. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341 [1st Dept 2002].

Here, the alleged payment withheld was pursuant to a contractual obligation, specifically the retainer agreement. The Court finds that plaintiffs have not sufficiently alleged any breached duty distinct from the breach of contract, thus making this claim duplicative of the breach of contract claim. Accordingly, the defendant's motion seeking dismissal of the conversion claim is granted.

#### 7th Cause of Action: Fraudulent Misrepresentation

For the same reasons plaintiffs' cause of action of fraud was dismissed, so too is the cause of action sounding in fraudulent misrepresentation. The complaint is devoid of the requisite factual

allegations to state a cause of action. CPLR § 3016(b) provides that when a cause of action is based upon fraud “the circumstances constituting the wrong shall be stated in detail.”

8th Cause of Action: Theft by Deception

The Court is not aware, nor have plaintiffs cited to any binding authority standing for the proposition that theft by deception is a viable cause of action in this jurisdiction. In any event, the factual allegations contained as it relates to that cause of action are the same allegations pertaining to the fraud and breach of contract causes of action. Accordingly, this cause of action is dismissed.

9th Cause of Action: Intentional Infliction of Emotional Distress

To state a cause of action for intentional infliction of emotional distress plaintiffs must allege extreme and outrageous conduct, an intent to cause or a disregard for the likelihood of causing severe emotional distress, a causal connection between the conduct and the injury and severe emotional distress (*Brown v NY Design Ctr., Inc.*, 215 AD3d 1, 6 [1st Dept 2023]).

Here, the Court finds that the amended complaint is insufficient to allege a cause of action of intentional infliction of emotional distress. Specifically, the amended complaint fails to identify conduct so egregious or outrageous to sustain this cause of action. Accordingly, this cause of action is dismissed.

10th Cause of Action: Negligent Infliction of Emotional Distress

To state a claim for negligent infliction of emotional distress, the plaintiffs must allege a breach of a duty of care resulting in a mental injury that is direct, rather than consequential (*Brown v NY Design Ctr., Inc.*, 215 AD3d 1, 9 [1st Dept 2023] internal quotations and citations omitted).

The amended complaint and the undisputed relationship between the parties, as attorney client, is insufficient to state a cause of action for negligent infliction of emotional distress.

Notably, the amended complaint fails to identify any duty owed by defendant to plaintiffs.

11th Cause of Action: Libel, Slander and Defamation

To be successful on a defamation claim, a plaintiffs must prove that defendant made “a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se” (*Epifani v Johnson*, 65 AD3d 224, 233 [2009] [internal quotations and citations omitted]). The complaint must set forth the particular words allegedly constituting defamation, the time, place and manner in which the false statement was made, and specify to whom it was made (CPLR 3016[a]; *id.*; *Dillon v City of New York*, 261 AD2d 34, 38 [1999]).

A defamatory statement is libelous per se “if the statement tends to expose the plaintiffs 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” (*Matovcik v Times Beacon Record Newspapers*, 46 AD3d 636, 637 [2007] [internal quotations and citations omitted]).

“In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Dillon*, 261 AD2d at 38 [citations omitted]). Certain statements are not actionable, like expressions of opinions, loose, figurative or hyperbolic statements, even if deprecating the plaintiffs, or an employer’s assessment of an employee’s job performance (*id.*; *Rinaldi v Holt*,

*Rinehart & Winston, Inc.*, 42 NY2d 369, 380 [1977] [internal quotations and citations omitted]).

Truth is a complete defense to defamation (*Rinaldi*, 42 NY2d at 380). Whether a particular statement constitutes fact or opinion is a question of law (*id.* at 381).

Defendant contends that this cause of action is time-barred pursuant to CPLR § 215(3). A liberal reading of the complaint fails to identify any specific quotes, dates and times of the alleged statements made. Thus, the Court does not reach the issue of statute of limitations as to the eleventh cause of action as the complaint fails to properly state a cause of action.

Accordingly, it is hereby

ORDERED that plaintiffs’ first, third, fourth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action in the amended complaint are dismissed; and it is further

ORDERED that defendant answer the amended complaint not more than twenty days following service of this Decision and Order with notice of entry; and it is further

ORDERED that plaintiffs must get leave of Court if they seek any future amendments of the complaint.

  
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6/25/2024  
DATE

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LYLE E. FRANK, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
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<input type="checkbox"/>	SUBMIT ORDER
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CHECK IF APPROPRIATE:

<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN
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<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
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