

McGough v Phillips & Assoc., PLLC

2025 NY Slip Op 30867(U)

March 18, 2025

Supreme Court, New York County

Docket Number: Index No. 153216/2024

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

-----X

MEAGAN MCGOUGH

Plaintiff,

- v -

PHILLIPS & ASSOCIATES, PLLC,

Defendant.

-----X

INDEX NO. 153216/2024

MOTION DATE 01/02/2025

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59 were read on this motion to/for DISMISSAL.

In this action, where plaintiff alleges that defendant law firm, maliciously initiated a lawsuit on behalf of its non-party client, knowing that the allegations in the complaint were false, defendant moves pre-answer to dismiss the complaint for failure to state a cause of action. Plaintiff alleges four causes of action against for: 1) Abuse of Process; 2) Intentional Infliction of Emotional Distress; 3) Tortious Interference with Advantageous Business Relationships; 4) Tortious Interference with Prospective Business Relations; and 5) Defamation Per Se.

DISCUSSION

Failure to State a Cause of Action

When reviewing a “motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), [courts] must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every reasonable inference, and determine only whether the facts, as alleged fit within any cognizable legal theory” (*Bangladesh Bank v Rizal Commercial Banking Corp.*, 226 AD3d 60, 85-86 [1st Dept 2024] [internal quotations omitted]). “In making this

determination, [a court is] not authorized to assess the merits of the complaint or any of its factual allegations” (*id.* at 86 [internal quotations omitted]).

Abuse of Process

“Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective” (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). “A cause of action for abuse of process strikes at the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process” (*Hoppenstein v Zemek*, 62 AD2d 979, 979-80 [2d Dept 1978]). “[T]he institution of a civil action by summons and complaint is not legally considered process capable of being abused” (*id.*; *see also Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590, 591 [1st Dept 1990] [“As a matter of law, service of a summons and complaint, even if made with malicious intent, is insufficient to state a cause of action for abuse of process”]).

Here, plaintiff alleges that defendants filed the underlying litigation, where defendant’s client, among other accusations, accused plaintiff of sexual harassment, while defendant was in possession of evidence that show there was a consensual relationship between defendant’s client and plaintiff. However, as in *Curiano*, the filing of summons and complaint, even with malicious intent, is not absent more, capable of sustaining an abuse of process claim. Further while, plaintiff alleges that that her counsel in the underlying litigation repeatedly communicated with defendant that the underlying complaint had no merit, plaintiff’s counsel never provided defendant with exculpatory information which corroborated these contentions that defendant’s client was being untruthful. Accordingly, the abuse of process claim will be dismissed.

Intentional Infliction of Emotional Distress

To establish a claim for Intentional Infliction of Emotional Distress (“IIED”), the following four elements must be alleged: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 121 [1993]). A plaintiff “must allege conduct that is 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” (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004]).

Here, the filing of a complaint on the behalf of its client, even one that is ultimately found to be without merit,¹ fails to rise to the level of outrageousness or extremity to go beyond all possible bounds of decency, necessary in order to plead a cause of action for IIED. Accordingly, the IIED claim will be dismissed.

Tortious Interference

To plead a claim for tortious interference with advantageous business relationships or business prospects, a plaintiff must plead that “(1) the plaintiff had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (4) there was resulting injury to the business relationship” (*Zetes v Stephens*, 108 AD3d 1014, 1020 [4th Dept 2013]). However, “[t]he *Noerr–Pennington* doctrine ... holds, essentially, that parties may not be subjected to liability for petitioning the government” (*Sutton 58 Assocs. LLC v Pilevsky*, 189 AD3d 726, 728 [1st Dept 2020]) “The filing of litigation falls within the protection of the *Noerr–Pennington* doctrine, which has been applied to bar claims of tortious interference predicated on

¹ The underlying action has not yet been resolved

the commencement of litigation” (*id.*). While there is a “sham” exception to that bar on tortious interference claims, to establish the exception a plaintiff must show that “the defendant’s conduct [is] objectively baseless with no reasonable expectation of success”, and that the defendants’ subjective intent was “to interfere directly with the business relationships of a competitor” (*Singh v Sukhram*, 56 AD3d 187, 192 [2d Dept 2008]).

Here, plaintiff alleges that defendant intended to damage her business relationships by filing the underlying lawsuit. However, these allegations do not meet the objective standard that the underlying litigation is “baseless with no reasonable expectation of success.” That litigation is still pending and plaintiff has failed to establish that the claims are meritless. Accordingly, both causes of action for tortious interference will be dismissed.

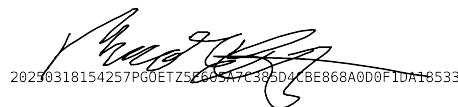
Defamation Per Se

“[A]bsolute immunity from liability for defamation exists for oral or written statements made by attorneys in connection with a proceeding before a court when such words and writings are material and pertinent to the questions involved” (*Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015]). However, “where an attorney’s statements are so needlessly defamatory as to warrant the inference of express malice the privilege has been abused and protection is withdrawn (*id.*). “If the statements are pertinent to a good faith anticipated litigation, no cause of action for defamation can be based on those statements” (*id.* at 715).

Here, as with the tortious interference claims, plaintiff has failed to establish that defendants acted in bad faith, or so “needlessly defamatory” as to warrant a withdrawal of the privilege granted to attorneys advocating for their clients in preparation for litigation. Therefore, the defamation per se cause of action will be dismissed.

Accordingly it is,

ORDERED that the motion to dismiss the complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of defendant.


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3/18/2025
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE