

Best-Simpson v Gosseen

2012 NY Slip Op 30749(U)

March 22, 2012

Sup Ct, New York County

Docket Number: 111313/11

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE *Jaffe*
J.S.C. Justice

PART 5

Index Number : 111313/2011
BEST-SIMPSON, COURTNEY
vs.
GOSSEN, ROBERT ET AL.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 111313111
MOTION DATE 12/1/11
MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for dismiss sanctions
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 12
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

FILED
MAR 28 2012
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/22/12
MAR 22 2012

BARBARA JAFFE J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
COURTNEY JANE BEST-SIMPSON,

Index No. 111313/11

Plaintiff,

Motion date: 12/1/11

-against-

Motion Seq. No.: 001

Motion Cal. No.: 13

ROBERT GOSSEEN, *et al.*

DECISION AND ORDER

Defendants.
-----X

BARBARA JAFFE, J.S.C.:

For defendants Cohen Hurkin, *et al.* and Alan Tennenbaum, Esq.:

Mark R. Anesh, Esq.

Lewis Brisbois Bisgaard & Smith, LLP

77 Water Street, 21st Floor

New York, NY 10005

212-232-1300

By notice of motion dated October 28, 2011 and submitted on default, defendants Cohen Hurkin Ehrenfeld Pomerantz & Tennenbaum, LLP and Alan Tennenbaum, Esq. (moving defendants) move pursuant to CPLR 3211(a)(7) and 22 NYCRR 130-1.1(a) and (c) for an order dismissing plaintiff's claims against them, imposing sanctions against her in the form of the costs and expenses they incurred in defending the instant action, and enjoining her from further filings in this matter without prior court approval or representation by counsel.

I. BACKGROUND

Sometime before June 23, 2011, 430 Clinton Avenue Associates commenced a landlord-tenant action against plaintiff. (Affirmation of Mark K. Anesh, Esq., dated Oct. 31, 2011).

Moving defendants represent 430 Clinton Avenue Associates in that action. (*Id.*).

On June 23, 2011, plaintiff, representing herself, commenced an action against moving defendants, along with nearly 50 other defendants, some of whom are named as defendants here,

with the filing of a summons and complaint in Supreme Court, Kings County. (*Id.*, Exh. B).

On or about October 4, 2011, plaintiff, again self-represented, commenced the instant action with the filing of a summons and complaint, asserting the following claims against moving defendants:

[T]he law firm of Cohen, Ehrenfeld, etc. made sure that Best-Simpson would have an even further distraction on that date, by sending her on August 5, 2010, a notice that she would be schedule[d] for an [e]xamination before trial in her landlord-tenant case on that date.

It is alleged that these defendants (430 Clinton Avenue Associates, Mark Leavitt, the law firm of Cohen, Ehrenfeld, Tannenbaum) conspired with the defendants to hold Jane Best-Simpson hostage in landlord tenant [c]ourt for over the last 3 years with the aiding and abetting of several Civil Court [j]udges, who have committed fraud in the assignment of the case to them specifically; to injure, harass, delay, dismiss and stall said action and permit the petitioners in that case to continue said action . . . in an effort to insure that said landlord tenant action strategically coincides with [the instant] litigation, so much so that her recent landlord tenant case was deliberately delayed by [the judge], [from] July 13, 2010 to August 5, 2010 to coincide with Courtney Best-Simpson filing an action against the defendants in the instant matter.

(*Id.*).

By affirmation dated October 31, 2011, moving defendants' counsel states that, "[u]pon information and belief, a majority of the co-defendants in the Kings [County] [a]ction have filed motions to dismiss, all of which remain pending." (*Id.*).

II. CONTENTIONS

Moving defendants assert that plaintiff has failed to state a claim for aiding and abetting fraud, as her complaint contains only conclusory allegations and lacks specificity, and that in any event she has failed to allege that their actions proximately caused her damages. (Mem. of Law). They also contend that the facts underlying the Kings County action are the same as those underlying the instant action, that plaintiff's filing of duplicate, meritless actions is frivolous, and that she should thus be sanctioned and enjoined from further litigation. (*Id.*).

III. ANALYSIS

A. Standard for dismissal

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party “the benefit of every possible favorable inference.” (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Thomas v Thomas*, 70 AD3d 588, 590 [1st Dept 2010]).

Liberally construing plaintiff’s complaint, she appears to be asserting claims for aiding and abetting fraud and conspiracy.

To state a claim for aiding and abetting fraud, a plaintiff must “allege the existence of the underlying fraud, actual knowledge, and substantial assistance.” (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). Claims for fraud must be pleaded with sufficient particularity, specifying in detail the “circumstances constituting the wrong” (CPLR 3016[b]) and alleging the elements of the cause of action, “misrepresentation of a material fact, falsity, scienter, and deception” (*Barclay Arms, Inc. v Barclay Arms Assocs.*, 74 NY2d 644, 647 [1989]). As plaintiff fails to allege the elements of the underlying fraud, she has failed to state a cause of action for aiding and abetting fraud.

“New York does not recognize civil conspiracy to commit a tort as an independent cause of action; rather, such a claim stands or falls with the underlying tort.” (*Scott v Fields*, 85 AD3d 756, 757 [2d Dept 2011]). Therefore, to the extent that plaintiff is asserting conspiracy against moving defendants, it fails.

In light of this determination, moving defendants’ contentions as to plaintiff’s failure to plead proximate cause of her damages need not be considered.

B. Sanctions

Pursuant to 22 NYCRR 130-1.1(a), “[t]he court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney fees[] resulting from frivolous conduct. Conduct is frivolous if, as pertinent here, “it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law” or was “undertaken . . . to harass or maliciously injure another.” (22 NYCRR 130-1.1[c]). The following must be considered in determining whether conduct is frivolous:

the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party.

(*Id.*).

Absent any indication that plaintiff filed the instant action to injure or harass moving defendants, and as no decision has been rendered on the motions to dismiss pending in the Kings County action such that plaintiff should be aware that her claims lack a legal basis, sanctions are inappropriate.

C. Injunction against future filings

Parties may be enjoined from further litigation where they have been found to have engaged in frivolous conduct. (*See Fowler v Conforti*, 194 AD2d 394 [1st Dept 1993] [court found that plaintiff-attorney acted frivolously in asserting defamation claim against other attorney arising out of oral argument in underlying action and enjoined him from “any further litigation emanating from [the underlying] case”]; *Martin-Trigona v Capital Cities/ABC, Inc.*, 145 Misc 2d

405 [Sup Ct, New York County 1989] [where plaintiff was law school graduate and continued to prosecute action after being "advised by [the] court of the baseless nature of th[e] action," court enjoined him from making additional filings or commencing additional actions as *pro se*]).

As plaintiff has not been found to have engaged in frivolous conduct, I decline to enjoin her from engaging in future litigation in this matter.

IV. CONCLUSION

Accordingly, it is hereby

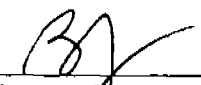
ORDERED, that moving defendants' motion to dismiss is granted to the extent that the complaint is hereby severed and dismissed in its entirety as against defendants Cohen Hurkin Ehrenfeld Pomerantz & Tennenbaum, LLP and Alan Tennenbaum, Esq. with costs and disbursements to Cohen Hurkin Ehrenfeld Pomerantz & Tennenbaum, LLP and Alan Tennenbaum, Esq., as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Cohen Hurkin Ehrenfeld Pomerantz & Tennenbaum, LLP and Alan Tennenbaum, Esq.; and it is further

ORDERED, that the remainder of the action shall continue; and it is further

ORDERED, that moving defendants' motion for sanctions is denied; and it is further

ORDERED, that moving defendants' motion for an order enjoining plaintiff from further litigation in this matter without prior court approval or representation of counsel is denied.

ENTER:


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

FILED
MAR 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

DATED: March 22, 2012
New York, New York

MAR 26 2012