

Abrams v Pecile

2012 NY Slip Op 31457(U)

May 25, 2012

Sup Ct, NY County

Docket Number: 110329/09

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 110329/2009
ABRAMS, SANDRA PIEDRABUENA
vs.
PECILE, DANIELLE
SEQUENCE NUMBER : 016
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2</u>
Replying Affidavits _____	No(s). <u>3, 4</u>

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

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

FILED

MAY 31 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/25/12

 J.S.C.

HON. EILEEN A. RAKOWER

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 15

-----X
SANDRA PIEDRABUENA ABRAMS,

Plaintiff,

Index No.
110329/09

FILED

Seq No.:
016

- against -

MAY 31 2012

Decision
and Order

DANIELLE PECILE,

Defendant.

NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. EILEEN A. RAKOWER, J.S.C.

This is an action for monetary damages allegedly suffered by plaintiff Sandra Piedrabuena Abrams as the result of defendant Danielle Pecile's unlawful conversion of photographs taken by defendant's husband Russell Abrams during their honeymoon. Presently before the Court is defendant's motion for summary judgment. Plaintiff opposes on the basis that the Appellate Division's May 24, 2011 decision is the "law of the case," that issues of material fact exist, and that the motion is premature given the outstanding discovery in this matter. Plaintiff cross moves for sanctions pursuant to NYCRR 130-1.1 against defendant and her counsel for allegedly filing a frivolous motion so as to delay defendant's deposition and prolong litigation.

Defendant was employed as an executive assistant to Russell and his brother Marc Abrams, at Titan Capital from March 27, 2008 until April 8, 2009. Defendant filed a claim with the EEOC on June 4, 2009, alleging that both Marc and Russell subjected her to "a continuing pattern of disparate treatment and discrimination based on [her] gender, including Sexual Harassment." In December 2008, Russell gave defendant two CDs and asked her to get them developed at Duane Reade. The CDs contained several topless photographs of plaintiff, Russell's wife. Defendant claimed that she saws the photos when she inserted the CDs in the photo machine and that

“upon handing the photographs back to Russell Abrams, he smirked callously, taking pleasure in [her] obvious embarrassment and discomfort.” Russell claims that he never told defendant what photographs were on the CDs or to view them. Defendant concedes that she kept one of the CDs. When Russell was notified by defendant’s attorney that he was in possession of the nude photographs, Russell demanded they be returned. Defendant’s counsel refused, asserting that the photographs were evidence of the sexual harassment. Defendant’s attorney allegedly offered to return the photographs if Russell agreed to settle the claim for \$2.5 million. The parties did not settle and defendant filed her claim with the EEOC on June 2, 2009. Defendant provided a copy of the photographs to the EEOC to support her claim. Plaintiff commenced this action on or about July 21, 2009 which stems from Pecile’s retention of the CD containing the photographs that was given to her by Russell. As a condition of plaintiff withdrawing the preliminary injunction portion of her complaint, the parties mutually agreed and executed a confidentiality agreement on July 23, 2009, which required counsel for the parties to: “jointly designate a neutral third party to take possession of the photographs, and retain them for safekeeping .”

Plaintiff’s Amended Complaint initially asserted claims against Pecile as well as defendants Cristina Culicea, Douglas Wigdor, and Thompson Wigdor LLP. Upon a motion to dismiss, Justice Walter B. Tolub rendered a decision on November 4, 2009 dismissing plaintiff’s claims as against defendants Cristina Culicea, Douglas Wigdor, and Thompson Wigdor LLP. Judge Tolub denied Pecile’s motion to dismiss the claims asserted against her. Plaintiff appealed Judge Tolub’s dismissal of her claims against the other defendants. On May 24, 2011, the Appellate Division, First Department, entered an Order affirming Judge Tolub’s dismissal. In her opposition to defendant’s instant summary judgment motion, plaintiff argues that the Appellate Division decision is the “law of the case.” However, the Appellate Division decision did not involve plaintiff’s claims against Pecile and has no bearing on the pending motion. Any language in the decision relating to plaintiff’s claims against Pecile is dicta. Furthermore, the Appellate Division’s decision was based on an underlying motion to dismiss which involves a completely different standard of review than employed by the Court with respect to summary judgment motions. As such, plaintiff’s argument that the Appellate Division’s decision is the “law of the case” lacks merit.

In support of her motion for summary judgment, defendant submits the following: a supporting Affirmation of defendant’s counsel David E. Gottlieb, Esq.,

Judge Tolub's November 9, 2009 Order; defendant's August 14, 2009 Affidavit; deposition transcript of Sandra Abrams held on August 3, 2011 and December 13, 2011; various emails; the Complaint and the Amended Complaint; defendant's EEOC charges; and an article published in the New York Post on July 25, 2009.

Plaintiff, in support her opposition and cross-motion, relies upon her counsel's affirmation and her affidavit dated March 23, 2012 (with exhibits).

At her deposition, Plaintiff testified that the subject photographs were taken by her husband while they were on their honeymoon, transferred to a computer in her house before the alleged conversion, and that her husband had copied the images to a CD which he then voluntarily provided to Pecile. (See, Abrams dep., December 13, 2011, 219:9-220:15, 54:18-56:17). Plaintiff also testified that her husband demanded the return of the photographs from Pecile. She testified that she did not have any part in the writing of the email demanding the return. (*Id.* at 18:4-19:2; 22:18-23:14.)

At her deposition, plaintiff was asked, "Do you claim that Danielle Pecile stole one CD or both CD's." Plaintiff testified, "I'm not claiming she stole a CD. I'm claiming she stole my pictures." (Abrams dep., December 13, 2011, 218:5-8.) When asked about the factual basis of her claim that she owned the subject photographs, she testified, "They are my pictures taken on my honeymoon by my husband, have my body on it. And they were my property." She also stated, "They were in my camera, in my memory card. I bought it. It was mine. It was in my hands." When asked what was in her hands, she responded, "The camera. The pictures. Everything." (Abrams dep., December 13, 2011, 46:22-47:23.) Plaintiff did not recall any details regarding the purchase of the camera and memory card. (*Id.* at 49:8-52:20.) She also did not provide any details regarding the purchase of the CD aside from testifying that her husband had purchased the CD and then testifying that she had purchased it. (*Id.* At 49:8-52:20, Abrams dep., 214:25-218:20.)

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (See, *Zuckerman v. City of New*

York, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (See, *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]; *Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-52 [1st Dept. 1989]). “[I]f it is reasonable to disagree about the material facts or about what may be inferred from undisputed facts, summary judgment may not be granted. Moreover, in deciding whether there is a material triable issue of fact, ‘the facts must be viewed in the light most favorable to the nonmoving party’” (See, *Ferluckaj v. Goldman Sachs & Co.*, 2009 NY Slip Op 2483 [2009]).

Here, defendant is entitled to summary judgment. The Amended Complaint asserts the following five causes of action: conversion, trespass to chattels and replevin of a CD and/or photographs, intentional infliction of emotional distress, and prima facie tort. There are no issues of material fact.

“A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.” (See, *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y. 3d 43, 50 [2006]). “Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights.” *Id.*

“A cause of action for replevin and conversion arises when the owner demands the return of its property and the demand is refused.” (*Solomon R. Guggenheim Foundation v. Lubell*, 77 N.Y. 2d 311, 317 [1991]).

In 2007, the New York Court of Appeals expanded the definition of conversion to include the taking of “electronic records that [are] stored on a computer and [are] indistinguishable from printed documents. . . .” (*Thyroff v. Nationwide Mut. Ins. Co.*, 8 N.Y.3d 283, 292-93 [2007]).

As stated by the court in *Leser v. Karenkooper.com*, 18 Misc. 3d 1119(A), 856 N.Y.S.2d 498 (Sup. Ct. 2008):

Although the Court of Appeals recently held that the wrongful denial of access to electronic records that are stored on a computer (and are indistinguishable from printed records) may be subject to a claim of conversion in New York

(see, *Thyroff v. Nationwide Mutual Insur. Co.*, 8 NY3d 283 [2007]), the Court merely permitted the tort of conversion to “keep pace with the contemporary realities of widespread computer use” (*Thyroff v. Nationwide Mutual Insur. Co.*, *supra* at 292). It expressly did “not consider whether any of the myriad other forms of virtual information should be protected by the tort” (*Id.* at 293), nor did it alter the definition of the tort itself.” Thus, a defendant who “does not exclude the owner from the exercise of his rights is not liable for conversion (citation omitted).” (*State of New York v. Seventh Regiment Fund, Inc.*, *supra* at 259–260.)

In *Leser*, among other claims, the plaintiff asserted claims of conversion and misappropriation based on allegations that “defendants wrongfully copied and displayed material, including images of handbags, from her website and improperly displayed said material on other locations on the web, without her permission . . .” Upon a motion to dismiss, the Court dismissed plaintiff’s conversion claim on the basis that plaintiff failed to allege that she was “ever deprived of the use of any material on her website and/or that any image or information was taken out of her dominion and control.” The Court noted that while there may be potential copyright infringements based on the factual allegations, there was no claim of conversion. (*18 Misc. 3d 1119(A).*)

Although plaintiff’s Amended Complaint asserts conversion and replevin of “photographs” and the CD, her testimony confirms that her gravamen is with respect to the photographic images that were contained on the CD created by her husband and given to Pecile lawfully. The basis of her claim of ownership of these images is that they depict her own body, were personal in nature, and taken by her husband on their camera. Such allegations do not establish ownership. Based on the record, the owner of the subject images and the CD is plaintiff’s husband. Plaintiff’s husband took the subject pictures, created the subject CD, and was in exclusive possession of the CD prior to providing it to Pecile voluntarily.¹ In her opposition papers, plaintiff claims

¹This would also comport with the principle set forth in copyright cases that a photographer owns all rights to his or her own photographs. (*See, Heyert v. Owens*, 12 Misc. 3d 1193A, *5 (N.Y. Sup. Ct. 2006)). An alleged reproduction of the images would also fall within the purview of copyright law. *Id.* (*See, generally Gordon v. Albums, Inc.*, 2008 NY Slip Op 28045, *5 [N.Y. Sup. Ct. 2008] (dismissing plaintiffs’ claims for conversion in which they seek to vindicate

-“joint” ownership in the photographs and CD.)) No affidavit of her husband or any other evidence was submitted to support plaintiff’s allegation of “joint” ownership.

Even if plaintiff could establish ownership in the images, photographs, and/or the subject CD, plaintiff cannot prove the additional requisite elements of a conversion or replevin claim. Based on plaintiff’s testimony, Pecile’s original possession of the CD containing these images was lawful, plaintiff was never deprived of any possessory interest in any of the images as she had a copy of them saved on her computer, and plaintiff never personally made any demand for the return of the CD and/or photographs. While plaintiff’s husband may have made a demand for the return of the images and/or CD, he is not a party in this action.

To establish a claim of trespass to chattels, a plaintiff must prove that the defendant “intentionally, and without justification or consent, physically interfered with the use and enjoyment of personal property in [plaintiff’s] possession, and that [plaintiff] was harmed thereby.” (*See, Sch. of Visual Arts v. Kuprewicz*, 3 Misc. 3d 278, 281 [N.Y. Sup. Ct. 2003]). “Thus, one who intentionally interferes with another’s chattel is liable only if the interference results in harm to ‘the [owner’s] materially valuable interest in the physical condition, quality, or value of the chattel, or if the [owner] is deprived of the use of the chattel for a substantial time.’” *Id.* (citing Restatement [Second] of Torts § 218, Comment e.). “Furthermore, to sustain this cause of action, the defendant must act with the intention of interfering with the property or with knowledge that such interference is substantially certain to result.” *Id.* Even if plaintiff were able to establish that the CD was her personal property and in her possession, her testimony demonstrates that she was never deprived of the images contained on the CD that form the basis of her claim. Furthermore, there is no evidence of any harm to the CD and the CD is currently in the possession of a neutral third party. As such, plaintiff has failed to state a claim based on trespass to chattels.

their rights in the distribution and reproduction of the photographic images on the basis that such rights are “clearly within the ambit of section 106 of the Copyright Act.”)

As to plaintiff's claim for prima facie tort against Pecile, this claim is also dismissed for failure to state a cause of action. "A prima facie tort claim requires a showing that a defendant inflicted economic damage without excuse or justification." (*See, India Garments, Inc. v Eric Jay, Ltd.*, 2008 NY Slip Op 31524U, 8 [N.Y. Sup. Ct. May 30, 2008] (*Board of Education v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397 (1975))). "New York courts do not recognize liability for prima facie tort unless malevolence is a defendant's sole motive." (*See, Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314 [1983]). "Motives of profit, economic self-interest, or business advantage bar recovery for prima facie tort." *Id.* (*Squire Records v. Vanguard Recording Soc'y*, 25 A.D.2d 190 [1st Dep't 1966]). In this case, plaintiff acknowledges that defendant allegedly retained the CD containing the subject images in part to further her own economic self-interest. As malice was not the sole motivation, the prima facie tort claim is dismissed.

"The tort of intentional infliction of emotional distress consists of four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." (*See, Cohn-Frankel v. United Synagogue of Conservative Judaism*, 246 A.D.2d 332 [1st Dep't 1998](citations omitted)). "Liability has been found only where the conduct 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." *Id.* "Courts are reluctant to allow recovery under the banner of intentional infliction of emotional distress absent a "deliberate and malicious campaign of harassment or intimidation." *Id.*

In the instant case, plaintiff seeks damages for intentional infliction of emotional distress based on the publicity generated about the photographs in question as well as Pecile's "blackmail" or "extortion." In response, defendant argues that "the only publicity generated by virtue of this case was instigated by Plaintiff's decision to file the Complaint, and not any action taken by Ms. Pecile. The New York Post Article that Plaintiff contends caused her emotional distress was published after Plaintiff filed her original Complaint (original Complaint filed on July 21, 2009 and New York Post article in question, dated July 25, 2009, respectively." Defendant cannot be held liable for plaintiff's own institution of the instant lawsuit. Furthermore, plaintiff has failed to establish that defendant intended to cause her "severe emotional distress." Defendant's action with the EEOC in which she attached the subject photographs as evidence of alleged discrimination was against plaintiff's husband and

brother in law, not plaintiff.

Plaintiff argues that defendant's motion is premature because defendant's counsel has denied plaintiff the opportunity to conduct the deposition of defendant and other necessary third parties and has refused to produce relevant documents. Plaintiff cannot rely on CPLR 3212(f) to explain her failure to submit competent evidence. Indeed, although CPLR 3212(f) provides grounds for denial of a summary judgment motion where "facts essential to justify opposition may exist but cannot then be stated, it is well settled that the mere hope that a party may be able to uncover some evidence during the discovery process is insufficient to deny summary judgment" pursuant to CPLR 3212(f). (See, *Pow v. Black*, 182 AD2d 484 [1st Dept 1992]) (internal quotes and citations omitted.). Here, however, additional discovery will not alter the fact that plaintiff cannot establish the requisite elements of the alleged causes of action based on her own testimony.

Plaintiff seeks sanctions, asserting that defendant's motion is a "tactic to delay Pecile's deposition and circumvent this Court's Order requiring Pecile to be deposed by January 31, 2012." Defendant's counsel replies that the parties had consented to the adjournment of deposition's deposition beyond the January 31, 2012 date before defendant filed this motion. There is no basis to impose sanctions.

Wherefore, it is hereby,

ORDERED that defendant's motion for summary judgment is granted and plaintiff's Amended Complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's cross motion for sanctions is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated:

5/25/12



FILED

EILEEN A. RAKOWER, J.S.C.

MAY 31 2012

8