Pawar v The Stumble Inn
2012 NY Slip Op 32667(U)
October 19, 2012
Sup Ct, NY County
Docket Number: 100686/12
Judge: Louis B. York
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SCANNED ON 10/24/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

INDEX NO. 100686/12

MOTION DATE

MOTION SEQ. NO. 001

VIKRANT PAWAR

-v-

The Stamble Inn, et al.

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). ____

Answering Affidavits — Exhibits ____ | No(s). ____

Replying Affidavits ____ | No(s). ____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
OCT 24 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 10/19/10

LBY
LOUIS B. YORK, 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: 2

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VIKRANT PAWAR

Plaintiff,

-against- Index No. 100686/12

THE STUMBLE INN, MBRP RESTAURANT GROUP, MANAGER, BARTENDER, WILLIAM SHERMAN, BRANDON QUIRK, BRIAN SMITH, RALF STEVENS, MITCH BANCHIK, JOHN DOE,

Defendants.

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York, Louis B., J.:

In this personal injury action, the remaining defendants[1] The Stumble Inn, MBRP Restaurant Group, and John Does Nathaniel Ruffle and James Cawthrone presently move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint on the ground that it fails to state a cause of action. In addition, the defendants seek: (1) sanctions against the plaintiff and plaintiff's attorneys pursuant to 22 NYCRR 130-1.1 and CPLR 8303-a; and (2) reimbursement of the cost of this motion, including, but not limited to, attorneys' fees, pursuant to 22 NYCRR 130-1.1.

According to the complaint, defendant The Stumble Inn (Bar) is a bar owned and operated by defendant MBRP Restaurant Group (MBRP). "John Doe" defendants Nathaniel Ruffle (Ruffle) and James Cawthrone (Cawthrone) were, at all relevant times, employees of MBRP. While at the Bar, the plaintiff, Vikrant Pawar (Pawar), paid Ruffle for a beer and drank

[1]Item number 9 of the Plaintiff's affirmation in opposition to this dismissal motion states that the "Plaintiff further consents to the dismissal of all of the individual defendants except [John Doe] defendants Cawthrone and Ruffel". The Plaintiff's unverified First Amended Complaint reflects the foregoing, as well as withdrawal of a number of causes of action and the addition of two more causes of action.

it. When leaving, he noticed a group of incoming patrons. Most of them appeared to be underage and/or intoxicated. He also noticed that Cawthrone, the acting bouncer/security guard, was not checking the newcomers for any form of age-verifying identification. Upon expressing his concerns to Cawthrone, Pawar was told "mind your own business, you don't pay my fucking bills." Pawar then left.

Pawar, as an attorney for the NYPD, felt it was part of his responsibility to do something. Consequently, Pawar promptly called 911 about his concerns. When police officers arrived outside the Bar, Pawar told them about the underage, intoxicated Bar customers. Then, while Pawar remained outside, the police officers entered the Bar to investigate. Shortly thereafter, and despite knowing that Pawar had money with him, Ruffle and Cawthrone falsely stated to the police officers, as well as to the on-looking crowd in front of the Bar, that he had stolen a $6.95 order of chicken wings. The Bar personnel then publicly accused Pawar of theft of services. As a result, the police drove Pawar to the NYPD Precinct, and upon further investigation, voided the theft of services charge, and allowed Pawar to leave.

The unverified First Amended Complaint asserts the following causes of action: (1) defamation; (2) violation of Pawar's First Amendment rights; and (3) vicarious liability of the Bar and MBRP for the conduct of their employees Cawthrone and Ruffle, under the theory of "respondeat superior." Pawar seeks compensatory and punitive damages.

The defendants now seek to dismiss the complaint for failure to state a cause of action (CPLR 3211 [a] [7]). On such a motion, the material allegations and everything reasonable to be implied therefrom are assumed to be true (*see Foley v D'Agostino*, 21 AD2d 60, 65 [1st Dept 1964]). In determining a motion to dismiss it is not the function of the court to evaluate the

merits of the case (*Carbillano v Ross*, 108 AD2d 776, 777 [2d Dept 1985]), or to express an opinion as to the plaintiff's ability to ultimately establish the truth of the averments (*219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the plaintiff must be "given the benefit of every possible favorable inference" (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]) and the motion to dismiss will fail if, "from [the pleading's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law ..." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Khan v Newsweek, Inc.*, 160 AD2d 425, 426 [1st Dept 1990])

Upon applying these principles to the asserted facts and circumstances, together with the applicable law, this CPLR 3211 (a) (7) dismissal motion is granted in all respects, and the defendants' application for sanctions and costs is denied in its entirety.

Pawar's first cause of action for defamation has been insufficiently asserted in the form of slander. Pawar's allegations that the Bar personnel falsely and publicly accuse him of theft of services and called him a thief are insufficient. The elements of a cause of action for slander are: "(i) a defamatory statement of fact, (ii) that is false, (iii) published to a third party, (iv) 'of and concerning' the plaintiff, (v) made with the applicable level of fault on the part of the speaker, (vi) either causing special harm or constituting slander per se, and (vii) not protected by privilege [citation omitted]" (*Albert v Loksen*, 239 F3d 256, 265-266 [2d Cir 2001]). "Generally, a plaintiff alleging slander must plead and prove that he or she has sustained special damages, i.e., 'the loss of something having economic or pecuniary value'" (*Rufeh v Schwartz*, 50 AD3d 1002, 1004 [2d Dept 2008] quoting *Liberman v Gelstein*, 80 NY2d 429, 434-435 [1992]). "A plaintiff need not prove special damages, however, if he or she can establish that the alleged defamatory

statement constituted slander per se" *(Rufeh v Schwartz,* 50 AD2d at 1004). The four exceptions which constitute slander per se are statements "(i) charging plaintiff with a serious crime; (ii) that tend to injure another in his or her trade, business or profession; (iii) that plaintiff has a loathsome disease; or (iv) imputing unchastity to a women" (*Liberman v Gelstein,* 80 NY2d at 435). "When statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven" (*id.*).

Here, Pawar has set forth his slander cause of action with the requisite specificity as to the words allegedly uttered by the defendant's employees, as well as the time, place and manner of the false statement (*see* CPLR 3016 [a]). However, Pawar has failed to sufficiently allege the requisite elements of either special damages or slander per se. The charge of stealing a $6.95 order of chicken wings, hardly constitutes that of a serious crime.

Pawar's second cause of action for violation of his First Amendment freedom of speech rights is predicated upon allegations that Bar personnel accused him of theft of services in retaliation for advising the NYPD of his concerns about the underage/intoxicated Bar patrons. Even though Pawar was not arrested and no charges were filed against him, he was transported to an NYPD precinct for questioning. The first major qualification is that the First Amendment, as with the other freedoms in the Bill of Rights, protects us from governmental, not private, interference with our speech. The First Amendment states that "[c]ongress shall make no law" infringing upon the freedoms of speech and religion. Because of this requirement, it is impossible for private parties (citizens or corporations) to violate these amendments, and all lawsuits alleging constitutional violations of this type must show how the government (state or federal) was responsible for the violation of their rights (*see Rendell-Baker v Kohn,* 457 US

830 [1982]; see also *Lugar v Metropolitan Edmonson Oil Co.*, 457 US 922 [1982]). This is referred to as the state action requirement. Furthermore, in order to state a First Amendment retaliation claim, a plaintiff must allege "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action" (*Davis v Goord,* 320 F3d 346, 352-353 [2d Cir 2003]). "'Only retaliatory conduct that would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights constitutes an adverse action [internal citation omitted]'" of the kind needed to support a retaliation claim (*id.* at 353). "Otherwise the retaliatory act is simply *de minimis* and therefore outside the ambit of constitutional protection [internal quotation marks and citation omitted]" (*id.*). Under the described circumstances, Pawar's allegations of retaliatory violation of his First Amendment right to freedom of speech fail to set forth a basis upon which to assert a cognizable claim in that he has merely asserted private, rather than governmental conduct.

Pawar's third cause of action asserted against MBRP is predicated upon the theory of "respondeat superior" whereby a principal is deemed vicariously liable for the wrongdoings of its agents who (i) were acting within the scope of their employment and (ii) the employer is, or could be, exercising some control over the employee's activities (*Lundberg v State of New York*, 25 NY2d 467, 470 [1969]; *see also Marfia v T.C. Ziraat Bankasi, New York Branch*, 100 F3d 243, 252 [2d Cir 1996]). Inasmuch as Pawar has insufficiently asserted a viable claim against Ruffle and/or Cawthrone who were, at all relevant times, performing their tasks on behalf of MBRP, the assertion of "respondeat superior" as a predicate upon which to seek relief is inapplicable. Therefore, Pawar's third cause of action fails.

As to punitive damages, such a remedy is awarded to discourage intentional wrongdoing, wanton and reckless misconduct, and outrageous or egregious behavior. Unlike compensatory or actual damages, punitive damages are predicated upon an entirely different public policy consideration of punishing reprehensible conduct or deterring its future occurrence by setting an example for similar wrongdoers. Since the complained of wrongful conduct in this action does not arise to that necessary to support a cause of action, the claim for punitive damages must, likewise, fail for lack of the predicate wrong.

As to 22 NYCRR 130-1.1 sanctions, the court must look at the broad pattern of conduct by the offending parties (*Levy v Carol Mat. Corp.*, 260 AD2d 27, 33-34 [1st Dept 1999]). Here, none of the parties may be characterized as acting with "clean hands" in that, at some point, each of the parties conducted itself or himself a vexatious manner. Their respective conduct has caused the already taxed and limited resources of both law enforcement and the judiciary to be exerted for unnecessary and wasteful reasons. As such, the court will not penalize one while not doing so to the other. Accordingly, the defendants' application for sanctions and costs is denied as inequitable.

In view of the foregoing, it is

ORDERED that the portion of the motion of defendants The Stumble Bar, MBRP Restaurant Group, Nathaniel Ruffle and James Cawthrone seeking to dismiss the complaint herein is severed and granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said

defendants; and it is further

ORDERED that the portion of the defendants' motion seeking sanctions and additional costs is denied.

Dated: 10/19/12

ENTER

J.S.C.

LOUIS B. YORK
J.S.C.

FILED
OCT 24 2012
COUNTY CLERK'S OFFICE
NEW YORK