

<b>Napoli v Rubin</b>
2017 NY Slip Op 30418(U)
March 1, 2017
Supreme Court, New York County
Docket Number: 155162/2016
Judge: Cynthia S. Kern
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NYSCEF DOC. NO. 40

RECEIVED NYSCEF: 03/03/2017

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 55

-----X  
PAUL NAPOLI

Plaintiff,

**DECISION/ORDER**  
**Index No. 155162/2016**

-against-

DENISE RUBIN,

Defendant.

-----X  
HON. CYNTHIA KERN, J.:

Defendant Denise Rubin brings the instant motion for an Order dismissing the complaint and for sanctions. For the reasons set forth below, defendant's motion to dismiss is granted but her request for sanctions is denied.

The relevant facts and procedural history of this case are as follows. In or around April 2015, defendant Rubin commenced an action against plaintiff Napoli in his individual capacity and against certain law firm entities by which she was employed and at which Napoli was a partner (hereinafter referred to as the "Firms") asserting four causes of action for (1) violation of New York City Administrative Code § 8-107, for alleged sex discrimination; (2) breach of contract for failing to pay bonuses/salary increases; (3) breach of contract for failing to pay plaintiff from October 14, 2014 through November, 2014; and (4) *quantum meruit* ("Action #1"). Thereafter, Napoli moved to dismiss Action #1 as against him individually, which this court granted pursuant to Partnership Law § 26 on the ground that "the Firms are all limited liability partnerships and plaintiff fails to allege that Napoli personally committed a discriminatory act against her to hold him personally liable."

Thereafter, defendant Rubin commenced another action against Napoli in his individual capacity under a separate index number asserting one cause of action for employment discrimination ("Action #2"). Napoli then moved to dismiss Action #2 in its entirety or, in the alternative, for an Order consolidating

Action #2 with Action #1. This court denied Napoli's motion to dismiss finding that "the complaint in [Action #2]... sufficiently corrects the defects and omissions which were fatal to the complaint in...[Action #1]" but granted Napoli's motion to consolidate the two actions (hereinafter referred to as the "consolidated action.") On or about March 30, 2016, Napoli filed an answer to the complaint in the consolidated action but did not assert a counterclaim against Rubin. However, also on that date, Napoli's "counterclaim counsel," Napoli Shkolnik, PLLC, filed a document entitled "Counterclaims of Napoli Bern Ripka Shkolnik, LLP, Worby Groner Edelman & Napoli Bern, LLP, Napoli Bern, LLP, Napoli Bern & Associates, LLP and Paul J. Napoli" which asserted eight separate standalone counterclaims against Rubin. On or about April 5, 2016, Napoli Shkolnik, PLLC filed the "First Amended Counterclaim" which asserted five counterclaims solely on behalf of Napoli in his individual capacity for intentional infliction of emotional distress, negligent infliction of emotional distress, defamation, defamation per se and tortious interference with contractual relations.

Rubin then moved to dismiss the counterclaims and for sanctions against Napoli. In a decision dated June 15, 2016, this court granted Rubin's motion to the extent that it dismissed Napoli's counterclaims pursuant to CPLR § 3011 on the ground that Napoli's "standalone counterclaims are procedurally improper" as they must be asserted in an answer but denied Rubin's motion for sanctions. Napoli then moved to amend his answer to properly assert the counterclaims against Rubin for intentional infliction of emotional distress, negligent infliction of emotional distress, tortious interference with contractual relations, defamation and defamation per se. In a decision dated September 29, 2016, this court denied Napoli's motion to amend his answer to assert counterclaims for defamation and defamation per se on the ground that such claims were time-barred; it denied Napoli's motion to amend his answer to assert counterclaims for intentional infliction of emotional distress and negligent infliction of emotional distress because Napoli failed to "allege conduct so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency or to be regarded as atrocious and utterly intolerable in a civilized community"; and it granted Napoli's motion to amend his answer to assert a counterclaim for tortious interference with contractual relations.

In or around June 2016, while the above motion practice was going on in the consolidated action, Napoli commenced the instant action against Rubin asserting causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, tortious interference with contractual relations, defamation and defamation per se arising out of the same conduct Napoli alleged in his proposed amended answer in the consolidated action. Rubin now moves to dismiss the complaint and for sanctions against Napoli for bringing this action.

As an initial matter, plaintiff's claims for intentional infliction of emotional distress, negligent infliction of emotional distress, defamation and defamation per se must be dismissed based on the doctrine of *res judicata*. Pursuant to CPLR § 3211(a)(5), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that...the cause of action may not be maintained because of...res judicata...." The doctrine of *res judicata*, or claim preclusion, "provides that as to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action." *Singleton Mgt. v. Compere*, 243 A.D.2d 213, 215 (1<sup>st</sup> Dept 1998). This doctrine is applied "when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first." *Id.* Further, even if certain claims were not litigated in the prior action, claims brought later will be barred by *res judicata* if they "could have been asserted in the first action and [plaintiff] had a full and fair opportunity to litigate those claims in that action." *Santiago v. New York Board of Health*, 8 A.D.3d 179, 181 (1<sup>st</sup> Dept 2004).

In the instant action, plaintiff's claims for intentional infliction of emotional distress, negligent infliction of emotional distress, defamation and defamation per se must be dismissed based on the doctrine of *res judicata* as such claims are identical to the counterclaims plaintiff sought to add in the consolidated action and this court denied such motion on the grounds that the claims for defamation and defamation per se were time-barred and the claims for negligent and intentional infliction of emotional distress were insufficiently pled.

In opposition, plaintiff argues the merits of this court's dismissal of the above claims in its September 2016 decision, specifically, that his claims for defamation and defamation per se are not time-barred and that he properly pled claims for negligent and intentional infliction of emotional distress. However, plaintiff's remedy is to seek reargument of or appeal this court's decision in the consolidated action or to seek leave to amend his answer to properly plead the counterclaims which this court found were improperly pled in the consolidated action and not to commence an entirely new action asserting the same claims this court has already dismissed. With regard to his claims for negligent and intentional infliction of emotional distress, plaintiff asserts that the complaint in the instant action contains new facts and evidence which demonstrates that Rubin is liable for both claims, including, that Rubin was aware of efforts on the part of another of the Firms' partners to defame Napoli; that Rubin did defame Napoli; and that Rubin threatened Napoli with violence during a vulnerable time in Napoli's life. However, such allegations are identical to those made in Napoli's proposed amended answer in the consolidated action and this court has already found that such allegations are insufficient to plead claims for negligent and intentional infliction of emotional distress.

Further, plaintiff's claim for tortious interference with contractual relations must be dismissed on the ground that he already has a counterclaim pending for such relief against Rubin in the consolidated action. CPLR § 3211(a)(4) provides for the dismissal of an action or a cause of action where another action is pending between the same parties for the same cause of action. As it is undisputed that the only counterclaim Napoli maintains against Rubin in the consolidated action is one for tortious interference with contractual relations which is identical to the claim he seeks to bring in the instant action, such claim must be dismissed.

Finally, that portion of Rubin's motion for sanctions against Napoli based on Napoli's frivolous conduct in commencing the instant action is denied as without basis.

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Accordingly, Rubin's motion is granted only to the extent that the complaint is dismissed in its entirety. This constitutes the decision and order of the court.

DATE:

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KERN, CYNTHIA S., JSCHON. CYNTHIA S. KERN  
J.S.C.