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| Kaplan v Karambelas |
| 2017 NY Slip Op 30851(U) |
| April 25, 2017 |
| Supreme Court, New York County |
| Docket Number: 157437/2013 |
| Judge: Cynthia S. Kern |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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PETER KAPLAN, M.D.,

Plaintiff,

DECISION/ORDER
Index No. 157437/2013

-against-

ANDREA KARAMBELAS,

Defendant.

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

Plaintiff commenced the instant action asserting claims for defamation, *prima facie* tort and malicious prosecution. In her answer, defendant asserts counterclaims for intentional infliction of emotional distress and abuse of process. Plaintiff now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing defendant’s counterclaims. Defendant cross-moves for an Order pursuant to CPLR § 3212 for summary judgment on her counterclaims and dismissing plaintiff’s complaint. For the reasons set forth below, plaintiff’s motion is granted in part and denied in part and defendant’s cross-motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff and defendant were married on April 17, 1993 and lived together as husband and wife for over 20 years. They are currently in the midst of divorce proceedings. On or about July 8, 2013, plaintiff told defendant that someone was going to throw acid in her face, that she was going to have an accident, that he did not care if he went to jail and that when he cracked, she would never see it coming. During his deposition, plaintiff testified that he did not actually intend to commit any violent acts against defendant but rather that he made these threats because she was pursuing him into the shower with a tape recorder. Thereafter, defendant contacted law enforcement. Plaintiff was charged with Criminal Possession of a Weapon in the Fourth Degree, Attempted Assault in the Third Degree and Harassment in the Second Degree based on the respective allegations that he “possessed a dangerous and

deadly instrument and weapon with the intent to use it unlawfully against another; with intent to cause physical injury to another person, attempted to cause such injury to another person; [and] with intent to harass, annoy and alarm another, subjected that person to physical contact and attempted and threatened to do the same.” On September 18, 2013, defendant signed a statement in support of these criminal charges against plaintiff, although she later testified on plaintiff’s behalf during his trial. After trial, plaintiff was acquitted of all criminal charges on June 18, 2015.

In his complaint, plaintiff alleges that defendant has made statements to their friends that he is a “junkie,” that he threatened her with having acid thrown on her face and having her cheeks cut off by Russian mob members, that he threatened their son with a gun and attempted to get a baton out of a briefcase to strike her and their son, that he is a drug dealer and sells drugs out of his office, that he is a pedophile and that he steals from defendant. During her deposition, defendant testified that she did not speak to their friends, including the persons to whom she allegedly made the aforementioned statements, about their divorce or marital situation as she “wouldn’t like no one [sic] to talk about anything because this [plaintiff] is the father of my son” and “damaging his medical practice is a detriment to me” as she receives maintenance. Further, she testified that she did not do anything that would damage his reputation or medical practice.

Both plaintiff’s motion and defendant’s cross-motion are denied with regard to defendant’s counterclaim for intentional infliction of emotional distress as the court finds that there are triable issues of fact with regard to this counterclaim, which is based on defendant’s allegations that plaintiff verbally threatened violence against defendant “on a weekly basis” and physically and verbally abused their son in her presence. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party

opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The elements of a claim for intentional infliction of emotional distress are: "(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." *Howell v. New York Post Co.*, 81 N.Y.2d 115, 121 (1993). Liability for intentional infliction of emotional distress will be found only where the conduct 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." *Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 303 (1983).

In the present case, the court finds that plaintiff is not entitled to summary judgment dismissing defendant's counterclaim for intentional infliction of emotional distress. Plaintiff's argument that his acquittal of the criminal charges on June 18, 2015 establishes that he did not engage in extreme and outrageous conduct is without merit. Initially, "an acquittal is not proof of innocence" with regard to criminal charges in a subsequent civil proceeding as civil proceedings involve "a lower standard than proof beyond a reasonable doubt." *Reed v. State*, 78 N.Y.2d 1, 8 (1991). Moreover, the allegations underlying defendant's counterclaim for intentional infliction of emotional distress are at least partly based on different conduct than the allegations underlying the criminal charges. Specifically, defendant alleges in her counterclaim for intentional infliction of emotional distress that plaintiff verbally threatened defendant with bodily harm on a weekly basis and physically and verbally abused their son in her presence. However, the criminal charges alleged that plaintiff "possessed a dangerous and deadly instrument and weapon with the intent to use it unlawfully against another; with intent to cause physical injury to another person attempted to cause such injury to another person; [and] with intent to harass, annoy and alarm another, subjected that person to physical contact and attempted and threatened to do the same."

To the extent that plaintiff contends that his allegedly extreme and outrageous conduct, in particular his threats to cause bodily harm to defendant, occurred in the course of intense arguments leading up to their

divorce and that he did not actually intend to commit any violent acts against defendant, such contention is unavailing. Even if plaintiff did not intend to act on his threats, this does not establish that he did not make the threats with the intent to cause, or disregard of a substantial probability of causing, severe emotional distress.

Further, plaintiff's argument that defendant has not suffered severe emotional distress because she has refused to seek professional medical or psychiatric assistance for the emotional distress and manifestations thereof allegedly caused by plaintiff's conduct is without merit. Medical treatment or psychological counseling is not "essential to the claim" for intentional infliction of emotional distress, "although relevant to damages." See *Garcia v. Lawrence Hosp.*, 5 A.D.3d 227, 228 (1st Dept 2004).

To the extent that plaintiff contends that the fact that defendant alleged during her deposition that plaintiff poisoned her face cream with pesticides and that the hospital subsequently diagnosed her with "disturbed emotional conduct" rather than with poisoning or any other physical problems is in any way relevant to defendant's counterclaim for intentional infliction of emotional distress, such contention is unavailing. Defendant does not allege that plaintiff poisoned her face cream as part of her claim for intentional infliction of emotional distress.

The court also finds that defendant is not entitled to summary judgment on her counterclaim for intentional infliction of emotional distress. In support of her motion, defendant cites to plaintiff's deposition testimony wherein he admitted that he told defendant that someone was going to throw acid in her face, that she was going to have an accident, that he did not care if he went to jail and that when he cracked, she would never see it coming. Defendant has also provided a picture allegedly showing bruises from plaintiff's physical abuse and a picture of a loaded clip of ammunition next to an ace of spades playing card, which was allegedly a death threat left by plaintiff for defendant. She also testified during her deposition that she suffered emotional distress from this conduct. However, plaintiff denies that he physically abused defendant and that he left a picture of a loaded clip of ammunition next to an ace of spades playing card for defendant. Further, the court cannot determine as a matter of law whether plaintiff's conduct was so outrageous that it exceeded the bounds of decency, whether plaintiff intended to cause, or

disregarded a substantial probability of causing, severe emotional distress or whether the emotional distress plaintiff suffered was severe. Instead, these are issues of fact that must be determined by the jury. See *Malvestuto v. Malvestuto*, 259 A.D.2d 1021, 1022 (4th Dept 1999) (“[T]he issue whether defendant’s conduct was so outrageous that it exceeded the bounds of decency presents a question of fact for the jury”); *Richard L. v. Armon*, 144 A.D.2d 1, 5 (2^d Dept 1989) (“Whether to draw an inference that he [the defendant] intended to cause distress from the nature of his act alone is, of course, a determination to be made by the trier of fact”); *Murphy v. Murphy*, 109 A.D.2d 965, 967 (3rd Dept 1985) (holding that whether the plaintiff suffered sufficiently severe emotional distress was a question of fact for the jury).

The portion of plaintiff’s motion for summary judgment dismissing defendant’s counterclaim for abuse of process is granted. “In its broadest sense, abuse of process may be defined as misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process.” *Board of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Assn., Local 1889, AFTAFL-CIO*, 38 N.Y.2d 397, 400 (1975). The elements of the cause of action of abuse of process are: (i) regularly issued civil or criminal process; (ii) “an intent to do harm without excuse or justification;” and (iii) “use of the process in a perverted manner to obtain a collateral objective.” *Curiano v. Suozzi*, 63 N.Y.2d 113, 116 (1984). “[T]he institution of a civil action by summons and complaint is not legally considered process capable of being abused.” *Id.*

In the present case, defendant’s counterclaim for abuse of process must be dismissed as the allegations underlying this counterclaim are solely based on plaintiff’s commencement of the instant civil action, which is not legally considered process capable of being abused. Accordingly, the portion of defendant’s motion for summary judgment on her counterclaim for abuse of process is denied.

The court next considers the portion of defendant’s motion for summary judgment dismissing plaintiff’s claim for defamation. Defamation arises from “the making of a false statement which tends to ‘expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.’” *Dillon v.*

City of New York, 261 A.D.2d 34, 38 (1st Dept 1999), quoting *Foster v. Churchill*, 87 N.Y.2d 744, 751 (1996).

In the present case, defendant has made a *prima facie* showing of her entitlement to summary judgment dismissing plaintiff's claim for defamation. During her deposition, defendant testified that she did not speak about plaintiff to the persons to whom she allegedly made defamatory statements and that she did not do anything that would damage his reputation or medical practice.

In opposition, plaintiff has failed to raise an issue of fact. Plaintiff has not submitted an affidavit or any portion of his deposition testimony wherein he states that defendant made the defamatory statements described in his complaint. Thus, the court finds that defendant is entitled to summary judgment dismissing plaintiff's claim for defamation. As the court has determined that defendant is entitled to summary judgment on this ground, the court need not consider defendant's remaining arguments with regard to plaintiff's claim for defamation.

The court next considers the portion of defendant's motion for summary judgment dismissing plaintiff's claim for *prima facie* tort, which is based on defendant's allegedly defamatory statements regarding plaintiff. "Prima facie tort affords a remedy for 'the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful.'" *Freihofer v. Hearst Corp.*, 65 N.Y.2d 135, 142 (1985). The elements of a cause of action for *prima facie* tort are: (i) the intentional infliction of harm; (ii) resulting in special damages; (iii) without excuse or justification; (iv) "by an act or series of acts which would otherwise be lawful." *Id.*

In the present case, defendant has established her entitlement to summary judgment dismissing plaintiff's claim for *prima facie* tort on the ground that she did not make the allegedly defamatory statements underlying his claim, as discussed above. In opposition, plaintiff has failed to raise an issue of fact.

The court next considers the portion of defendant's motion for summary judgment dismissing plaintiff's claim for malicious prosecution. To establish a claim for malicious prosecution, a party must demonstrate "(1) the commencement or continuation of a...proceeding by the defendant against the

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plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) the absence of probable cause for the...proceeding and (4) actual malice." *Broughton v. State of New York*, 37 N.Y.2d 451, 457 (1975). See also *Wilhelmina Models, Inc. v. Fleisher*, 19 A.D.3d 267, 269 (1st Dept 2005).


In the present case, defendant has failed to make a *prima facie* showing of entitlement to summary judgment dismissing plaintiff's claim for malicious prosecution. Defendant's argument that the fact that she testified on behalf of plaintiff during the criminal trial shows that she did not maliciously prosecute the proceeding against plaintiff is without merit. Plaintiff alleges that defendant commenced and continued the criminal proceeding notwithstanding the fact that she knew there was no basis for said proceeding, including by signing a statement in support of the criminal charges. Thus, the mere fact that defendant eventually testified on behalf of plaintiff does not establish as a matter of law that she did not earlier commence and continue the proceeding without probable cause and with actual malice.

Further, defendant's argument that there was probable cause for the proceeding based on the threats made by plaintiff is without merit. The criminal charges alleged that plaintiff "possessed a dangerous and deadly instrument and weapon with the intent to use it unlawfully against another; with intent to cause physical injury to another person attempted to cause such injury to another person; with intent to harass, annoy and alarm another, subjected that person to physical contact and attempted and threatened to do the same," not merely that plaintiff verbally threatened to harm defendant. Thus, defendant has failed to establish as a matter of law that there was probable cause for the aforementioned criminal charges.

Accordingly, the portion of plaintiff's motion for summary judgment dismissing defendant's counterclaim for abuse of process is granted but the motion is otherwise denied. The portion of defendant's cross-motion dismissing plaintiff's claims for defamation and *prima facie* tort is granted but the cross-motion is otherwise denied. This constitutes the decision and order of the court.

DATE:

4/25/17


 KERN, CYNTHIA S., JSC
 HON. CYNTHIA S. KERN
 J.S.C.