

Mount Pleasant Cemetery Assn. v Burke

2011 NY Slip Op 32952(U)

October 12, 2011

Sup Ct, Suffolk County

Docket Number: 40793-10

Judge: Peter Fox Cohalan

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SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART XXIV - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN

-----x
MOUNT PLEASANT CEMETERY ASSOCIATION,

Plaintiff,

-against-

BRIAN BURKE,

Defendant,

-----x
BRIAN BURKE,

Counterclaim Plaintiff,

-against-

STEVE SCERRI as an individual and as an Officer of
Plaintiff, Mount Pleasant Cemetery Association,

Additional Counterclaim
Defendant.

-----x

CALENDAR DATE: May 25, 2011
MNEMONIC: MG

PLTF'S/PET'S ATTORNEY:
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DEFT'S/RESP ATTORNEY:
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Certilman Balin Adler & Hyman, LLP
Counterclaim Defendant
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East Meadow, New York 11554

Upon the following papers numbered 1 to 12 read on this motion to dismiss _____;
Notice of Motion/Order to Show Cause and supporting papers 1-8; Notice of Cross-Motion and
supporting papers _____; Answering Affidavits and supporting papers 9-12; Replying
Affidavits and supporting papers _____; Other _____; and after hearing counsel in support of and
opposed to the motion it is,

ORDERED that this motion by the additional counterclaim defendant, Steve Scerri, for
an order dismissing the defendant/counterclaim plaintiff Brian Burke's counterclaims as
against him in his individual capacity pursuant to CPLR §3211 is granted in its entirety.

The plaintiff, Mount Pleasant Cemetery Association, is the operator of a public
cemetery and not-for-profit corporation operating Mount Pleasant cemetery located at
Cemetery Road in Center Moriches, Suffolk County, Long Island, New York. The plaintiff
brought this action sounding in conversion against the defendant, Brian Burke (hereinafter
Burke), a former employee, who is alleged to have removed certain personalty from the
plaintiff's premises. The defendant was employed as a laborer at the plaintiff's premises from
December 18, 2006 until July 3, 2010, his last day, when the plaintiff alleges Burke removed,
inter alia, hardware, machinery, power equipment and tools, belonging to the plaintiff. The
defendant claims the property actually belonged to him for use at the cemetery. The plaintiff
thereafter instituted this action against Burke for conversion with the service of a summons
and complaint filed on November 5, 2010. Burke served his verified answer with ten (10)
counterclaims alleged against Steve Scerri (hereinafter Scerri) as an individual and as an
officer of the plaintiff.

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Complicating this case is the fact that the counterclaim defendant Scerri is the uncle of defendant/counterclaim plaintiff Burke.

The counterclaim defendant Scerri now moves individually to dismiss the counterclaims asserted by the defendant/counterclaim plaintiff Burke pursuant to CPLR §3211 (a)(6) and §3211 (a)(7) because the counterclaims against Scerri individually are improperly imposed in this action and fail to assert a cause of action on which relief may be granted. The defendant/counterclaim plaintiff Burke opposes the requested relief.

For the following reasons, Scerri's motion to dismiss pursuant to CPLR §3211 is granted and the action is dismissed only as against the counterclaim defendant Scerri individually. The action is severed and continued as against Scerri as an officer of the plaintiff.

As Professor David D. Siegel has noted in **New York Practice** §258:

"CPLR 3211 merely supplies the procedural expedient for bringing to the court's attention a ground that supports an early dismissal of a cause of action or defense. The merits of the particular ground, and whether it supports the dismissal sought, may involve a vast realm of law, substantive or procedural or both."

The Court when considering a motion to dismiss pursuant to CPLR §3211 must afford a liberal construction to the allegations contained within the counterclaims, accept the facts contained therein as true and must accord the benefit of every favorable inference to them and merely determine whether the facts alleged raise a cognizable legal theory upon which a recovery may occur. *Goldfarb v. Schwartz*, 26 AD3d 462, 811 NYS2d 414 (2nd Dept. 2006). However, while a pleading's factual allegations are presumed to be true on a motion to dismiss under CPLR §3211, bare legal conclusions and factual claims that are flatly contradicted by the allegations in the case or the evidence are not presumed to be true. *Lutz v. Caracappa*, 35 AD3d 673, 828 NYS2d 426 (2nd Dept. 2006); *Syracuse Orthopedic Specialists, PC v Hootnick*, 16 AD3d 1019, 793 NYS2d 305 (4th Dept. 2004). Thus, allegations in support of the counterclaims which are devoid of a factual basis and are vague and conclusory are properly dismissed. See, *Stoianoff v. Gahona*, 248 AD2d 525, 670 NYS2d 204 (2nd Dept. 1998).

Here, in the case at bar, Burke contends that the plaintiff's complaint of conversion of cemetery equipment is misplaced and that it was his own equipment that he brought with him when he started his employment with the plaintiff and that he took with him when his employment ended. Burke on his counterclaims has asserted ten (10) of them against Scerri individually which all revolve around his employment with the plaintiff. The counterclaims as against Scerri as an officer of the plaintiff could withstand a motion to dismiss, at least as to some counterclaims, but in this case the counterclaims allege a failure to pay wages, breach of contract, conversion of property as against Scerri individually as well as in Scerri's role as a corporate officer and cannot stand.

Metropolitan Switch Bd. Co v. Amici Assocs., 20 AD3d 455, 799 NYS2d 531 (2nd Dept. 2005). Further, there is no basis for a claim of civil harassment in New York [see, **Santoro v. Town of Smithtown**, 40 AD3d 736, 835 NYS2d 658 (2nd Dept. 2007); **Ralin v. City of New York**, 44 AD3d 838, 844 NYS2d 83 (2nd Dept. 2007)] nor does Burke, a former employee, have standing to assert a claim for misappropriation of not-for-profit assets of the plaintiff. **Segal v. Powers**, 180 Misc2d 57, 687 NYS2d 658 (2007).

The Court notes that Burke is related to the defendant Scerri, who apparently is not only an officer of the not-for-profit plaintiff but also runs the cemetery. Clearly the complaint in this action as well as the counterclaims asserted involve the retention or removal of certain equipment claimed by both the plaintiff and Burke as well as an employment dispute between Burke and his employer, the plaintiff, not Scerri in his individual capacity. The facts asserted in the counterclaims are mere legal conclusions devoid of any factual basis to support the claim or with facts which are contradicted by the plaintiff's complaint. **In re Loukoumi, Inc.**, 285 AD2d 595, 728 NYS2d 383 (2nd Dept. 2001); **Doria v. Masucci**, 230 AD2d 764, 646 NYS2d 363 (2nd Dept. 1996).

As to Burke's claim of defamation as against Scerri individually, the alleged use of derogatory names when referring to Burke are of a personal nature and are not within the parameters of this lawsuit involving the use and/or conversion of the equipment and therefore pursuant to CPLR §3211 (a)(6) are not properly interposed here. Even if the Court were to view the statements as within the context of Burke's employment, no defamation claim was made.

"Defamation has long been recognized to arise 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. The elements are a false statement, published without a privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (**Dillon v City of New York**, 261 AD2d 34, 704 NYS2d 1 [1st Dept 1999]). "In cases involving defamation per se, the law presumes that damages will result, and special damages need not be alleged or proven" (**Gatz v Otis Ford**, 274 AD2d 449, 711 NYS2d 467 [2d Dept 2000]). The per se categories consist of the following statements: (1) the plaintiff committed a crime; (2) the statement tends to injure the plaintiff in his or her trade, business or profession; and (3) the plaintiff has contracted a loathsome disease among others (see **Matherson v Marchello**, 100 AD2d 233, 473 NYS2d 152 [2d Dept 1984]). When the defamatory statement falls into one of these categories, "the law presumes damage to the slandered individual's reputation so that the cause is actionable without proof of special damages" (**60 Minute Man, Ltd. v Kossman**, 161 AD2d 574, 555 NYS2d 152 [2d Dept 1990]).

Defamation traditionally consists of two related causes of action i.e. libel and slander. The demarcation between libel and slander rests upon whether the allegedly defamatory words are written or spoken (**Matherson v Marchello**, *supra*). Slander is the uttering of defamatory words which tend to injure another in his reputation, office, trade, etc. (**Shapiro v**

Glens Falls Ins. Co., 39 NY2d 204, 383 NYS2d 263 [1976]; *Liffman v Brooke*, 59 AD2d 687 [1st Dept 1977]. Libel is always considered as written (*Liffman v Brooke, id.*; *Matherson v Marchelleo, supra*; *Locke v Gibbons*, 164 Misc 877, 299 NYS2d 188 [Sup Ct, New York County 1937])

Whether particular words are defamatory presents a legal question to be resolved by the Court in the first instance (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 659 NYS2d 836 [1997]; *Spewell v NYP Holdings, Inc.*, 1 Misc 3d 847, 772 NYS2d 188 [Sup Ct, New York County 2003]. In deciding whether the statement is defamatory the Court must determine if it constitutes a statement of fact or opinion i.e. whether the reasonable person would have believed that the statements were conveying facts about the plaintiff.

The essence of defamation is the publication of a statement about an individual that is both false and defamatory. Because only assertions of fact are capable of being proven false, a defamation action cannot be maintained unless it is premised on published assertions of fact (*Brian v Richardson*, 87 NY2d 46, 637 NYS2d 347 [1995]). Non-actionable "pure opinion" is a statement of opinion accompanied by recitation of facts upon which it is based, or, if not accompanied by such factual recitation, the statement must not imply that it is based upon undisclosed facts (*Steinhalber v Alphonse*, 68 NY2d 283, 508 NYS2d 901 [1986]). Expressions of an opinion, "false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions" (*Steinhalber v Alphonse, id.*).

In addition, words of general abuse, though vexatious or discourteous, are not actionable in the absence of an allegation and showing of special damages (*Landy v Norwegian America Line Agency, Inc.*, 26 AD2d 923, 274 NYS2d 687 [1st Dept 1966]; *Torres v Huner*, 150 AD 798, 135 NYS 332 [2d Dept 1912]; *Todd Layne Cleaners, LLC v. Maloney*, 17 Misc 3d 1114(A), 851 NYS2d 67 [Civ Ct, New York County 2007]; *Rizzo v Zucker*, 18 Misc 2d 593, 182 NYS2d 246 [Sup Ct, Queens County 1958]). Here the statements made about Burke were loose, figurative or hyperbolic, which even if deprecating him were not actionable defamation (*Kaye v Trump*, 58 AD3d 579, 873 NYS2d 5 [1st Dept 2009]; *Dillon v City of New York, supra*; *Stephan v Cawley*, 24 Misc 3d 1204[A], 890 NYS2d 371 [Sup Ct, New York County 2009]; *Penn Warranty Corp. v DiGiovanni*, 10 Misc 3d 998, 810 NYS2d 807 [Sup Ct, New York County 2005]). Although it is clear that the language was offensive to Burke, it is not actionable as slander as it does not falsely relate facts or characteristics concerning him (*600 West 115th Street Corp. v Von Guffeld*, 80 NY2d 130, 589 NYS2d 825 [1992]). Therefore, the counterclaim asserted as to defamation is dismissed.

Finally, CPLR§3211 (a)(6) deals with the remedies inherent in a counterclaim violation under CPLR §3019 (c) referable to a "capacities" rule. Professor David D. Siegel in his treatise *New York Practice*, 3d edition §225 indicates that

"If a party has several capacities, a counterclaim involving that party may be used only in respect of the capacity in which she [he] appears in the action.

The commentaries to CPLR §3019 (c) C3019:3 state "The purpose of these rules is obviously to preclude an unwarranted mixture of a personal individual and representative liabilities and assets through the confusing use of counterclaims in litigation." This is especially so herein where Burke is the nephew of an officer of the plaintiff and seeks to plead his uncle into the case in his individual capacity where the lawsuit is instituted about the recovery and ownership interests of the plaintiff or Burke as to certain property in which Scerri has no interest. See, *Linzer v. Bal*, 184 Misc2d 132, 136, 706 NYS2d 831 (2000).

The plaintiff in this action is a not-for-profit corporation which seeks the return of its property allegedly taken by Burke, yet Burke in his counterclaims and in this dispute over alleged equipment and who is its rightful owner, improperly alleges counterclaims against Scerri, a non-plaintiff, in his individual capacity. See, *Michelman-Cancelliere Iron Works, Inc. v Kiska Constr. Corp.*, 18 AD3d 722, 795 NYS2d 715 (2nd Dept. 2005) wherein the Court citing to *Ruzicka v. Rager*, 305 NY 191, 111NE2d 878 stated a claim and counterclaim must be stated by and against the same party in the same capacity. See also, *Kruse v. Capuozzo*, 2010 WL 1437733. Clearly, the counterclaims alleged against Scerri in his official capacity as an officer of the not-for-profit plaintiff are supportable and survive a motion to dismiss under CPLR §3211(a)(6). However, as to Scerri in his individual capacity such claims are subject to CPLR §3211(a)(6) scrutiny and, under the facts in this action, are subject to dismissal.

Accordingly, the counterclaim defendant Scerri's motion in his individual capacity to dismiss the alleged counterclaims against him is granted and the counterclaims asserted against Scerri individually are dismissed. The counterclaims asserted against Scerri in his representative capacity as an officer of the plaintiff, Mount Pleasant Cemetery Association, are severed and continued.

The foregoing constitutes the decision of the Court.

Dated: October 12, 2011



J.S.C.