

Savitt v Estate of Nicholas Passantino

2013 NY Slip Op 32652(U)

October 11, 2013

Supreme Court, New York County

Docket Number: 152636/12

Judge: Doris Ling-Cohan

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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice** **Part 36**

RICHARD SAVITT,

Plaintiff,

INDEX NO. 152636/12

-against-

MOTION SEQ. NO. 001

**ESTATE OF NICHOLAS PASSANTINO, A/K/A NICK
SANTINO AND FRANK PASSANTINO, A/K/A
FRANCESCO PASSANTINO, ADMINISTRATOR
FOR THE ESTATE OF NICHOLAS PASSANTINO
A/K/A NICK SANTINO,**

Defendant.

The following papers, numbered 1-8 were considered on this motion to dismiss for failure to state a cause of action:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3</u>
Replying Affidavits _____	<u>4</u>
Supplemental Affidavits _____ (memos of law)	<u>5, 6, 7, 8</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	_____

Upon the foregoing papers, it is ordered that this motion is decided as indicated below.

BACKGROUND

Plaintiff Richard Savitt (Savitt), an attorney, commenced this action against defendant Estate of Nicholas Passantino, aka Nick Santino, (Estate of Santino) seeking monetary damages. Nick Santino (Decedent Santino) was a former client of plaintiff Savitt and committed suicide before this case was filed. Defendant Frank Passantino, Decedent Santino’s father was appointed administrator of the estate and defends this case. Plaintiff Savitt’s complaint alleges five causes of action as follows: (1) libel *per se*; (2) slander *per se*; (3) harassment in the first degree; (4) negligent infliction of emotional distress; and (5) intentional infliction of emotional distress.

Defendant Estate of Santino filed the within pre-answer motion to dismiss pursuant to CPLR 3211(a)(2), 3211(a)(7), and 3211(a)(10), on the grounds that this court does not have subject matter jurisdiction, the complaint fails to state a cause of action, and this court should not proceed in the absence of a person who should be a party¹.

DISCUSSION

Preliminarily, the court notes that defendant Estate of Santino moves to dismiss this action, in part, for lack of subject matter jurisdiction. However, defendant Estate of Santino has failed to address this argument in the within submissions. As such, this argument is deemed abandoned and the court need not address it.

It is well settled that, pursuant to CPLR 3211(a)(7), on a motion to dismiss for failure to state a cause of action, the movant has the burden to demonstrate that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). A motion to dismiss the complaint for failure to state a cause of action “will generally depend upon whether or not there was substantial compliance with CPLR 3013.” *Catli v Lindenman*, 40 AD2d 714, 715 (2d Dep’t 1972). If the allegations are not “sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action”, the cause of action will be dismissed. *Id.* CPLR 3013 provides that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” In determining whether to grant a motion to dismiss, the court accepts the facts alleged in a complaint as true, and determines whether the

¹ By order dated April 19, 2013, this court ordered both parties to submit additional memoranda of law regarding CPLR 4519, which was not properly briefed in the initial submissions.

facts as alleged fit within any cognizable theory of law. *See Morone v Morone*, 50 NY2d 481, 484 (1980); *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Additionally, all such facts must be accorded every favorable inference. *Beattie v Brown & Wood*, 243 AD2d 395, 395 (1st Dep't 1997).

Here, plaintiff Savitt, an attorney, seeks to hold defendant Estate of Santino liable for monetary damages in an amount “not less than \$1,000,000”, resulting from Decedent Santino’s alleged conduct and behavior towards plaintiff Savitt. According to the complaint², around 2007 or 2008, Decedent Santino was referred to plaintiff Savitt by Brian Van Orsdel for some legal work. Plaintiff Savitt alleges that he declined to provide legal services to Decedent Santino, who subsequently started to call plaintiff Savitt and left multiple messages threatening plaintiff Savitt’s life. In January 2009, Decedent Santino allegedly confronted plaintiff Savitt in a sports club, “raced up behind [plaintiff Savitt], threw a dumbbell at his head, slapped him in the head and then ran away.” Notice of Motion, Exh. C, Complaint, ¶ 10. Plaintiff contends that he filed a complaint with the New York City Police Department (NYPD) based on this incident, but was unable to get an order of protection, as Decedent Santino was not arrested. Plaintiff further contends that from January 2009 until the time of Decedent Santino’s death, on January 25, 2012, plaintiff Savitt “lived in constant fear” of Decedent Santino. *Id.* at ¶ 16. The complaint also describes an incident in the summer of 2010 wherein Decedent Santino allegedly followed or located plaintiff Savitt at a restaurant in Montauk, New York, threatened to kill him and started to attack, but was stopped by bystanders. While plaintiff Savitt called the NYPD to report the incident, he was allegedly told that it was a Montauk police matter. The complaint is silent as to whether plaintiff Savitt contacted the Montauk police to report the incident, at the time of the incident or any time thereafter. Based on this incident, plaintiff Savitt allegedly went to court again to seek an order of

² The court notes that the complaint is incomplete, as the only portion of ¶ 4 that appears in the complaint is the last line. The beginning of ¶ 4 is missing.

protection but, again, was unable to obtain one. In December 2011, plaintiff claims that while he was getting ready to start a trial in the New York Civil Court, Decedent Santino threatened his life in the courtroom and was subsequently thrown out. The complaint does not claim that any criminal charges were filed. Thereafter, Decedent Santino purportedly began writing emails to another attorney, Soraya Ruiz Abderashmann (Abderashmann), wherein he made allegedly false statements about plaintiff Savitt. After the courtroom incident in December 2011, plaintiff Savitt claims that he “knew SANTINO was ready to kill someone, so he went to the police station, filed a report and then called 911 to report SANTINO’S constant threats to [his] life.” *Id.* at ¶ 24. No action was taken by the NYPD as a result of plaintiff’s complaint. On December 12, 2011, Decedent Santino sent a letter to Honorable Andrea Masley, allegedly containing false statements about plaintiff Savitt. Additionally, Decedent Santino allegedly “told third parties, Mark Muscarella and others, within the past year, that [plaintiff Savitt] ‘is an unethical Attorney’, that he ‘paid [plaintiff Savitt] \$8,000 for legal work and that [plaintiff Savitt] took the money and did no work’, that [plaintiff Savitt] ‘is an incompetent attorney’, that [plaintiff Savitt] ‘has lost cases for all his client’s’ ”. *Id.* at ¶ 29.

Defendant Estate of Santino moves to dismiss the complaint in its entirety, arguing that plaintiff Savitt’s First and Second causes of action, for libel *per se* and slander *per se* respectively, must be dismissed because the oral and written statements complained of were absolutely privileged because they were made during the course of, or related to a judicial proceeding. Specifically, defendant Estate of Santino contends that the statements made in the courtroom incident in December 2011, were made in the course of a bench trial, in front of Judge Masley, in which Decedent Santino was the *pro se* plaintiff, attorney Abderashman was the attorney representing the defendant in that case (*Santino v Muscarella*, CV-041865-10), Mark Muscarella (Muscarella). Supposedly, Muscarella and plaintiff Savitt are friends, and plaintiff Savitt had been assisting him until Muscarella retained attorney Abderashman. Defendant

Estate of Santino contends that the emails to attorney Abderashmann were privileged, as she was the attorney representing the defendant in such Civil Court case. Further, defendant Estate of Santino contends that the statements made to Muscarella were also privileged, as Muscarella was the defendant in the Civil Court case. Moreover, defendant Estate of Santino argues that plaintiff Savitt's Third cause of action must be dismissed as New York does not recognize a common-law cause of action for harassment. As to plaintiff's Fourth and Fifth causes of action, for negligent and intentional infliction of emotional distress respectively, defendant Estate of Santino argues that such causes of action must be dismissed as they are time-barred and fail to state a cause of action, in that plaintiff Savitt does not specify any specific dates to place the allegations within the three year statute of limitations for negligence, and that no allegations of malice were made in the complaint. Finally, defendant Estate of Santino argues for dismissal of the complaint, as this action may not proceed in the absence of a necessary party, Decedent Santino, and, thus, is barred by CPLR 3211(a)(10) and 4519, commonly referred to as the "Dead Man's Statute".

In opposition, plaintiff Savitt argues that the privilege, which covers defamatory statements made during the course of and related to judicial proceedings, is not absolute. Plaintiff Savitt claims that the letter sent to Judge Masley made no reference to a case and was not in regards to any judicial proceeding. Plaintiff Savitt further argues that the statements made by Decedent Santino, both written and oral, were made with malice and are not covered by the privilege, as the "statements were in fact false, libelous, slanderous and defamatory causing the Plaintiff [Savitt] harm." Savitt Affirmation, ¶ 64. Plaintiff Savitt also claims that all five causes of action were "properly plead and recognized under New York law." *Id.* at ¶ 66. According to plaintiff Savitt, all the "causes of action arose in Summer 2010 and on December 12, 2011, which are within the statute period", and thus, timely. *Id.* at ¶ 67. According to plaintiff Savitt's supplemental memorandum of law, he argues that "[e]vidence...subject to exclusion on

objection under the Dead Man Statute, should not predetermine the result on summary judgment in anticipation of the objection.” Plaintiff Savitt’s supplemental memorandum of law, ¶ 22. Plaintiff Savitt further argues that, pursuant to CPLR 3212, a motion may be stayed for further discovery. In support of his arguments, without prior permission and contrary to the CPLR, plaintiff Savitt attaches the affidavits of Geoff Ringelstein and Mark Muscarella³ to his supplemental memorandum of law⁴, purporting to corroborate the allegations in the complaint, and, thus, claims that such allegations can be proved at trial, without plaintiff Savitt’s own testimony, such that the Dead Man’s Statute is inapplicable. Such affidavits were not considered, as plaintiff Savitt did not seek permission for submission of such affidavits (constituting a sur-reply), and as the court only ordered memos of law on a specific issue.

Plaintiff Savitt’s First and Second Causes of Action

The Appellate Division, First Department, has held that:

[a]n absolute privilege is based upon a communicator’s official participation in the process of government[, and]...is intended to insulate him from any inhibitions in carrying out that function. ...[A]ttorneys are considered as much protected participants in this process as are Judges, jurors, parties and witnesses. ...Furthermore, the privilege is not limited to statements made in open court, but also embraces communications between attorneys...[a]s long as the subject of an out-of-court communication relates to pending or contemplated litigation, and is made in connection with a judicial proceeding.

Caplan v Winslett, et al., 218 AD2d 148, 152-153 (1st Dep’t 1996)(internal citations omitted). In so holding, the *Caplan* court made clear that statements made in open court, and out-of-court, are protected by an absolute privilege when such statements relate to the pending litigation or a judicial proceeding.

Here, the statements allegedly made by Decedent Santino in the courthouse, emails sent to

³ Even if considered, both affidavits are inherently incredible as they refer to an incident with Decedent Santino on December 12, 2012, when it is undisputed that Decedent Santino committed suicide on January 25, 2012, before such date.

⁴ Instead of submitting a memo of law as directed in the April 19, 2013 order, plaintiff Savitt inexplicably submitted an affirmation and additional affidavits, without permission.

attorney Abderashmann, and the letter sent to Judge Masley were related to an on-going legal proceeding in which Decedent Santino was the *pro se* plaintiff, attorney Abderashmann was representing Mark Muscarella, the defendant, and the Honorable Andrea Masley was the presiding judge. In the letter sent to Judge Masley, Decedent Santino alleged that plaintiff Savitt is a childhood friend of Mark Muscarella, and that plaintiff Savitt coached Mark Muscarella while he was *pro se* in such judicial proceeding prior to referring attorney Abderashmann. These statements, made in open court, and out-of-court, were made in connection to a pending litigation, and thus, are protected by an absolute privilege. As such, plaintiff Savitt's First and Second causes of action must be dismissed.

Plaintiff Savitt's Third Cause of Action

Defendant Estate of Santino is correct in arguing that New York does not recognize a common-law cause of action for harassment. Aside from plaintiff Savitt's conclusory statements, he has provided no statutory or case law to support his argument that his "cause...of action for...harassment...[is] properly plead and recognized under New York law." Savitt Affirmation, ¶ 66. In fact, the Appellate Division, First Department has specifically held that "New York does not recognize a common-law cause of action for harassment". *Edelstein v Farber*, 27 AD3d 202, 202 (1st Dep't 2006). Thus, regardless of the veracity of plaintiff Savitt's allegations, his Third cause of action for harassment must be dismissed.

Plaintiff Savitt's Fourth Cause of Action

Plaintiff Savitt's Fourth cause of action is for negligent infliction of emotional distress. The Appellate Division, First Department has held that such cause of action, "which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety". *Bernstein v East 51st Street Development Co., LLC*, 78 AD3d 590, 591 (1st Dep't 2010). Further, a claim for negligent infliction of emotional distress must sufficiently set forth a

duty owed by the defendant, to the plaintiff. See *Losquadro v Winthrop Uni. Hosp.*, 216 AD2d 533, 534 (2d Dep't 1995); *O'Reilly v NYNEX Corp.*, 262 AD2d 207, 208 (1st Dep't 1999).

Taking the allegations in the complaint as true, plaintiff Savitt has failed to state any viable cause of action against defendant Estate of Santino for negligent infliction of emotional distress. Significantly, the complaint is devoid of any allegations that a duty was owed by defendant Estate of Santino, or Decedent Santino, to plaintiff Savitt. As such, plaintiff Savitt's Fourth cause of action must be dismissed.

Plaintiff Savitt's Fifth Cause of Action

A claim for intentional infliction of emotional distress is governed by a one-year statute of limitations. See CPLR 215(3); *Peters v Citibank, N.A.*, 253 AD2d 803, 804 (2d Dep't 1998). The Appellate Division, First Department has made clear that "[t]he intentional infliction of emotional distress is time-barred absent an allegation that defendant...did anything in the one-year period prior to the commencement of the instant action". *Spinale v Guest*, 270 AD2d 39, 40 (1st Dep't 2000). Such "tort has 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." *Howell v New York Post Co., Inc.*, 81 NY2d 115, 121 (1993).

Here, plaintiff Savitt's allegations regarding the sports club incident in January 2009, and the incident in a restaurant in Montauk in the summer of 2010, may arguably be extreme and outrageous conduct. However, such allegations fall outside the one-year statute of limitations, as this action was commenced, by summons and complaint, on May 10, 2012. Accordingly, allegations regarding plaintiff Savitt's claim of intentional infliction of emotional distress must include allegations from May 2011 to

May 2012. *See Spinale*, 270 AD2d at 40. Further, while the complaint attempts to incorporate plaintiff Savitt's allegations regarding the statements, both written and oral, allegedly made by Decedent Santino, into the Fifth cause of action, "[l]iability [for intentional infliction of emotional distress] 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". *Howell v New York Post Co.*, 81 NY2d at 122. To the extent that the allegations regarding statements made by Decedent Santino are true, such statements regarding plaintiff Savitt's character do not rise to the level of going "beyond all possible bounds of decency, and to be regarded as...utterly intolerable in civilized community". *Id.*; *Dillon v City of New York*, 261 AD2d 34, 41 (1st Dep't 1999).

The only remaining allegation in the complaint, which is not barred by the statute of limitations, is plaintiff Savitt's claim that Decedent Santino threatened his life in December 2011. According to the complaint, Decedent "Santino crept up next to [plaintiff] Savitt and...threatened [plaintiff] Savitt's life again, this time in the middle of the courthouse", and was later removed from the court. Notice of Motion, Exh. C, Complaint, ¶22. It is unclear from the complaint, which fails to detail the alleged threats made by Decedent Santino, how Decedent Santino's conduct was so extreme in degree as to be atrocious and utterly intolerable in a civilized community. *See Cohn-Frankel v United Synagogue of Conservative Judaism*, 246 AD2d 332, 332 (1st Dep't 1998). Moreover, plaintiff Savitt's claim for intentional infliction of emotional distress must be dismissed, as such allegations are not sufficiently particular, in that the complaint fails to plead every material element of the cause of action of intentional infliction of emotional distress. Specifically, plaintiff Savitt has failed to set forth allegations of extreme and outrageous conduct which intentionally or recklessly caused him severe emotional distress. *See Catli v Lindenman*, 40 AD2d 714, 715 (2d Dep't 1972); *Howell v New York Post*, 81 NY2d at 122; *Dillon v City of New York*, 261 AD2d 34, 41 (1st Dep't 1999). Therefore, plaintiff Savitt's Fifth cause of

action must be dismissed.

As this court has determined that plaintiff Savitt's complaint must be dismissed in its entirety, it need not address defendant Estate of Santino's argument regarding CPLR 3211(a)(10).

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted, and this action is dismissed with prejudice; and it is further

ORDERED that within 30 days of entry, defendant shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the decision/order of the Court.

Dated: 10/11/13



DORIS LING-COHAN, J.S.C.

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