

**Garcia v Peluso**

2014 NY Slip Op 30222(U)

January 23, 2014

Sup Ct, New York County

Docket Number: 158342/2012

Judge: Eileen A. Rakower

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: \_\_\_\_\_  
*Justice*

PART 15

Index Number : 158342/2012  
GARCIA, PRENDINELLYS  
vs  
PELUSO, NATHAN JOHN  
Sequence Number : 003  
DISMISS ACTION

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). 1, 2

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 3

Replying Affidavits \_\_\_\_\_ | No(s). 4, 5

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

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 1/23/14

 \_\_\_\_\_, J.S.C.

HON. EILEEN A. RAKOWER

- 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 — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

*Justice*

PRENDINELLYS GARCIA,

INDEX NO. 158342/2012

Plaintiff,

MOTION DATE \_\_\_\_\_

- against -

MOTION SEQ. NO. 003, 4

NATHAN JOHN PELUSO a/k/a JOE ESPOSITO,

MOTION CAL. NO. \_\_\_\_\_

Defendants.

NATHAN JOHN PELUSO,

Cross/Counter-Plaintiff,

- against -

PRENDINELLYS GARCIA, DOMINIC SARNA, and  
JOHN DOE a/k/a CARLO,

Cross/Counter-Defendants.

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answer — Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion: Yes  No

The Amended Verified Complaint alleges that “[o]ver the course of a period of time,” defendant Nathan John Peluso a/k/a Joseph Esposito “possessed, made, sold, and distributed video and audio tapes of plaintiff and other women to third parties and other persons without plaintiff’s knowledge and consent,” that demand was made for the return of the video images of Plaintiff, but that Defendant refused to do so, and that Defendant “has on numerous occasions threatened, stalked and harassed plaintiff by using the retention of these videotapes in order to coerce, extort, and threaten plaintiff.”

Based on these allegations, the Amended Verified Complaint alleges the following three causes of action: assault and battery; intentional infliction of emotional distress; and replevin and injunctive relief.

Defendant Nathan John Peluso ("Peluso") interposed an answer to the Amended Verified Complaint, which denied plaintiff Prendinely Garcia's ("Garcia") allegations, asserted certain affirmative defenses, and interposed counterclaims against Garcia and cross claims against defendants Dominic Sarna ("Sarna"), Garcia's attorney, and John Doe a/k/a Carlo.

As against Garcia, Peluso asserts counterclaims for breach of contract (first cause of action), unjust enrichment (second cause of action), negligence (third cause of action), malicious prosecution (fourth cause of action), abuse of process (fifth cause of action), assault and battery (sixth cause of action), and defamation (seventh cause of action).

As against Sarna, Defendant asserts cross claims for assault and battery (sixth cause of action) and defamation (seventh cause of action).

Presently before the Court is Sarna's motion for an Order, pursuant to CPLR § 3211(a)(7), to dismiss Peluso's cross/counterclaims (Mot. Seq. #3) and Garcia's motion to dismiss Peluso's counterclaim (Mot. Seq. #4).

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(7) the pleading fails to state a cause of action.

In determining whether dismissal is warranted for failure to state a cause of action, the court must "accept the facts alleged as true ... and determine simply whether the facts alleged fit within any cognizable legal theory." (*People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 AD2d 91 [1st Dept. 2003]) (internal citations omitted) (*see* CPLR §3211[a][7])

Peluso's first counterclaim is for breach of contract against Garcia. "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and

resulting damage.” (*Flomenbaum v New York Univ.*, 2009 NY Slip Op 8975, \*9 [1st Dept. 2009]). Here, Peluso alleges that Peluso offered to loan money with the understanding that Garcia would pay back the loans, Garcia accepted Peluso’s offer by accepting the money, that Garcia breached the parties contract by failing to re-pay Peluso the amount of the loan, and resulting damage. Peluso’s first counterclaim adequately pleads a cause of action for breach of contract against Garcia.

Peluso’s second counterclaim is for unjust enrichment against Garcia which requires allegations “the other party was enriched, at plaintiff’s expense, and that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered.” (*Georgia Malone & Co., Inc. v. Rieder*, 86 A.D.3d 406 [1st Dep’t 2011]). “The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.” (*Clark- Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y. 2d 382, 399 [1987]). Here, Peluso alleges that he “loaned Garcia money with the understanding that Garcia would pay back the loans,” Peluso “allowed Garcia to live in his vacant apartment without immediately paying rent,” and Garcia was “unjustly enriched to the detriment” of Peluso “[a]s a result of receiving money from Mr. Peluso without paying him back, and receiving housing without paying for rent.” Peluso’s second counterclaim therefore states a claim for unjust enrichment against Garcia.

Peluso’s third counterclaim is for negligence against Garcia based on allegations that Garcia had an Albino Boxer that Garcia knew had violent tendencies, the dog attacked Peluso causing serious physical injury on April 13, 2012, and Peluso continues to suffer effects. To establish negligence, the plaintiff must show the following elements: (1) that a duty of care was owed by the defendant to the plaintiff; (2) breach of the duty; (3) proximate cause; and (4) damages. (*Alvino v. Lin*, 300 AD2d 421, 751 NYS2d 585 [2002]). The owner of a domestic animal who knows or has reason to know that the animal has a vicious disposition is strictly liable for injury caused by the animal. (*Collier v. Zambito*, 1 NY3d 444, 775 NYS2d 205, 807 NE2d 254 [2004]). Here, accepting the allegations as true, Peluso’s third counterclaim states a claim for negligence against Garcia.

Peluso’s fourth counterclaim is for malicious prosecution against Garcia. The elements of a malicious prosecution claim are: (1) the initiation of a criminal proceeding by the defendant against the plaintiff; (2) termination of the proceeding

in favor of the accused; (3) lack of probable cause; and (4) malice. (*Brown v. Sears Roebuck & Co.*, 297 AD3d 205 [1<sup>st</sup> Dept 2002]). Here, Peluso alleges that Garcia commenced a civil action against Peluso alleging claims of negligence and invasion of privacy that Garcia knew had no merit, made these allegations with malice to harass Peluso and to extort him, those claims were dismissed, and that Peluso has suffered damages including loss of employment and pension as a result of the allegations. As Peluso alleges only commencement of a civil action, not a criminal proceeding, Peluso's fourth counterclaim fails to state a claim.

Peluso's fifth counterclaim is for abuse of process against Garcia. "Abuse of process has three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." *Curiano v. Suozzi*, 63 N.Y.2d 113, 116 [1984]). However, the mere commencement of a civil action by summons and complaint does not constitute abuse of process and a malicious motive alone does not give rise to a cause of action to recover damages for abuse of process. (*Id.*). Here, Peluso alleges that Garcia "used regularly issued process by serving and filing the original and instant summons and complaint," filed the complaint with the "express intent to harm Mr. Peluso," "to be embarrass" him and destroy his "reputation," as evident by "the completely irrelevant allegations that are contained in the original complaint" and "the egregious accusations." Peluso, however, has failed to allege facts sufficient to plead the third element, "use of the process in a perverted manner to obtain a collateral objective," and therefore the fifth counterclaim fails to state a claim.

Peluso's sixth counterclaim is for assault and battery as against Garcia, Carlo, and Sarna. "Assault is defined as an intentional attempt or threat to do injury or commit a battery." A battery "is intentional and wrongful physical contact with a person without his or her consent." *See Stanley v. Amalithone Realty, Inc.*, 921 N.Y.S. 2d 491, 502 (N.Y. Sup. 2011). Peluso alleges that after he refused to loan Garcia additional money and attempted to collect on his loans, Garcia's fiancé Carlo "began to use threats, coercion and extortion to try to force Mr. Peluso to pay Garcia money that she was not owed," and "demanded that Mr. Peluso 'meet with [him] like a man' and threatened Mr. Peluso with physical violence unless Mr. Peluso gave Carlo Mr. Peluso's camera." Peluso further alleges that "Sarna then called Mr. Peluso, directly referenced Carlo's prior threats and stated that he thought the issue could be resolved 'amicably,'" and that "Mr. Peluso felt threatened, coerced and extorted by the actions of Carlo, Garcia, and Sarna." Here, as Peluso only alleges acts by Carlo and does not allege any

deliberate act taken by Garcia or Sarna to make contact with Peluso's person or property, Peluso fails to state a claim for assault and battery against Garcia and Sarna.

Peluso's seventh counterclaim is for defamation against Garcia. Peluso alleges that Garcia made false and defamatory statements about him to multiple people, "including but not limited to 'Carlo'", accused Peluso of crimes including "videotaping her without her knowledge and videotaping a group of men gang-raping her," that Peluso has suffered damages by way of loss of his job, pension, and reputation, and that such comments constitute defamation *per se*.

CPLR §3016(a) requires that a plaintiff alleging defamation plead with sufficient particularity the actual allegedly defamatory words used by the defendant(s); in addition, the plaintiff must set forth the time, place, and manner of the communication (*Dillon v. City of New York*, 261 A.D.2d 34 [1st Dept. 1999]).

"The elements [of a defamation claim] are a false statement, published without 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 A.D.2d 34 [1st Dept. 1999]).

"The four established exceptions (collectively "slander *per se*") consist of 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 woman." *Lieberman v. Gelstein*, 80 N.Y.2d 429, 435 [1992].

Here, accepting the facts alleged as true, Peluso has stated a cause of action for defamation *per se* as against Garcia.

Peluso's eighth counterclaim is for defamation against Sarna. Peluso alleges, "Upon information and belief, Sarna published a knowingly false complaint, which contained preposterous and false allegations to the New York Post, and New York Daily News" which included "allegations that Mr. Peluso videotaped Garcia without her knowledge, and extorted Garcia into performing lewd acts," and resulting damages.

"The Court of Appeals long ago established that a statement made in the

course of judicial proceedings is absolutely privileged if it is at all pertinent to the litigation.” *Depalo v Lapin*, 2009 N.Y. Misc. LEXIS 5963 [N.Y. Misc. 2009](citations omitted). “In judicial proceedings, the protected participants include the Judge, the jurors, the attorneys, the parties and the witnesses.” [*Id.*](citations omitted). Furthermore, “an absolute privilege affords a speaker or writer immunity from liability for an otherwise defamatory statement to which the privilege applies, regardless of the motive with which the statement was made.” *Sexter & Warmflash, P.C. v. Margrabe*, 38 AD3d 163, 170-71 [1st Dept 2007](citations omitted).

Here, since Peluso’s claim of defamation against Sarna arises solely out of the allegations contained in Garcia initial Complaint, the claim is barred by the judicial proceedings privilege.


Wherefore, it is hereby,

ORDERED that plaintiff Prendinely Garcia’s motion is granted to the extent that the fourth (malicious prosecution), fifth (abuse of process) and sixth counterclaims (assault and battery) asserted by defendant Nathan Peluso are dismissed as against Garcia; and it is further

ORDERED that Dominic Sarna’s motion is granted in its entirety and defendant Nathan Peluso’s cross claims as against Sarna are dismissed, and the Clerk shall enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

**Dated: JANUARY 23, 2014**

  
 \_\_\_\_\_  
 HON. EILEEN A. RAKOWER <sup>J.S.C.</sup>

Check one: FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE