

Gidumal v Cagney

2015 NY Slip Op 31473(U)

August 6, 2015

Supreme Court, New York County

Docket Number: 152774/2015

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

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

-----X
STEVEN GIDUMAL, an individual,

Plaintiff,

-against-

Index # 152774/2015

DECISION/ORDER

JOLANTYNA J. CAGNEY, an individual,
SPECIAL LEGAL SUPPORT, INC., A New
York Corporation, and DOES 1-10

Defendant.

Present:

Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR § 2219 (A), of the papers considered in the review of this Motion/Order to Dismiss.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	<u> 1 </u>
Order to Show Cause and Affidavits Annexed	<u> </u>
Answering Affidavits.....	<u> 2 </u>
Replying Affidavits.....	<u> 3 </u>
Exhibits.....	<u> </u>
Memoranda.....	<u> - </u>
Cross-Motion	<u> </u>

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendants Jolantyna J. Cagney and Special Legal Support, Inc (“Defendants”) move for an Order dismissing the case pursuant to CPLR 3211 (a)(7) for failure to state a cause of action and for costs and attorneys fees against Plaintiff pursuant to 22 N.Y.C.R.R. §130 for frivolous litigation. For the reasons discussed below the Defendant’s motion to dismiss for failure to state a cause of action is granted.

This case stems from the service of documents on the Plaintiff, Steven Gidumal, (“Plaintiff”). Defendant, Jolantyna J. Cagney (“Cagney”) is a licensed process server with approximately 12 years of experience. She was retained by Plaintiff’s wife’s divorce attorney Mr. Elliot to serve papers on the Plaintiff.

In his Complaint, Plaintiff is not disputing that he was served. Rather, Plaintiff alleges

two causes of action against the Defendants. The first cause of action alleges Defendants violated New York City Administrative Code §20-409.2 and the second is abuse of process.

The basis of Plaintiff's complaint stem from comments allegedly made by Plaintiff to Cagney when she was attempting to serve him and also from an incorrect date on the AOS. It is undisputed that Cagney served Plaintiff a first set of papers, the Summons and Complaint, on October 3, 2014 without incident. Moreover, Plaintiff is not disputing he was served the Order to Show Cause, the second set of papers, on October 16, 2014.

The initial service of the Summons and Complaint on October 3, 2014 appears to have occurred without incident. There is a dispute as to an alleged incident on October 16, 2014, the second time Cagney was serving Plaintiff papers. According to Cagney, while Plaintiff was attempting to avoid service, the papers fell to the ground. She alleges that when she reminded him that the papers contained personal information he turned to pick them up and while she was taking a picture of picking them up, he called her a "f.k... whore" and F..@ing bitch". She included the incident on the AOS as advised by Mr. Elliot. In addition, while Cagney was filling out the AOS she included, in the "Personal Service on Individual" section that she recognized Plaintiff from her previous personal service on Plaintiff on 10/3/14. However, instead of typing "10/3/14", she typed "1/3/14" which she noticed when she was reviewing the AOS a few days later. However this time she put "11/3/14" instead of "10/3/14" although this time she did not notice the error and had it notarized on October 20, 2014 with the incorrect date. During an email exchange, Elliot pointed out that the date was incorrect. Assuming she had already corrected it, she claims did not look at the AOS.

Plaintiff denies Cagney's version of the events and he alleges her accusations regarding his behavior during service as well as the incorrect date included on the affidavit are part of a conspiracy between Cagney, Plaintiff's wife and her attorney, Mr. Elliot. Plaintiff claims that Cagney's action were part of a concerted effort to deceive the Court in his divorce case and to "malign prejudice and injure" him during that proceeding.

The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (Stukuls v State of New York, 42 NY2d 272, 366 N.E.2d 829, 397 N.Y.S.2d 740 [1977]) and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (Rovello v Orofino Realty Co., Inc., 40 NY2d 633, 357 N.E.2d 970, 389 N.Y.S.2d 314)). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (Given v County of Suffolk, 187 AD2d 560, 590 N.Y.S.2d 217 [2d Dept 1992])).

Plaintiff's first cause of action alleges Cagney violated laws and rules governing service of process pursuant to New York City Administrative Code §20-409.2. The New York City

Administrative Code §20-409.2 affords a private right of action for persons aggrieved by a process server's illegal conduct and it requires process servers to comply with all laws, rules and regulations. Plaintiff cites three separate statutes but appears to focus on NYC Department of Consumer Affairs Rules §2-235 requiring that a licensed process server shall not sign or notarize an affidavit of service until all factual averments have been set forth. Although not entirely clear, Plaintiff appears to focus on the Consumer Affairs Rules §2-235 which requires that a licensed process server shall not sign or notarize an affidavit of service until all factual averments have been set forth. Plaintiff is apparently claiming that the date of 11/4/14 (instead of 10/4/14) listed as the date Cagney previously served Plaintiff and the alleged profanity towards Cagney by Plaintiff state a Cause of Action under New York City Administrative Code §2-235. I again note that Plaintiff is not disputing that he was served. Affording the Plaintiff every possible inference I find that Plaintiff has failed to state a cause of action under the under the New York City Administrative Code §20-409.2.

There are three essential elements of the tort of abuse of process: first, there must be regularly issued process, civil or criminal, compelling the performance or forbearance of some prescribed act; second, the person activating the process must be moved by a purpose to harm without that which has been traditionally described as economic or social excuse or justification; and third, the defendant must be seeking some collateral advantage or corresponding detriment to [the] plaintiff which is outside the legitimate ends of the process." In its broadest sense, abuse of process may be defined as the misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process. (Board of Education v. Farmingdale Classroom Teachers Assoc., 38 N.Y.2d 397 (N.Y. 1975 *citing* James v Saltsman, 99 AD2d 797, 797-798, 472 NYS2d 129 [1984]; *Berisic v. Winckelman*, 40 A.D.3d 561 (N.Y. App. Div. 2d Dep't 2007)).

If process has a legitimate purpose, the allegation that it was misused does not suffice to state a claim for abuse of process. (*Casa de Meadows Inc. (Cayman Islands) v Zaman*, 76 A.D.3d 917, 921 (N.Y. App. Div. 1st Dep't 2010) *citing* *Roberts v Pollack*, 92 AD2d 440, 445, 461 NYS2d 272 [1983]). In this case Cagney, served Plaintiff an Order to Show Cause for his impending divorce case. Hence, the process had a legitimate purpose and Plaintiff has failed to state a cause of action for abuse of process.

In this case, even if the Court were to accept all factual allegations as true it still would not fit into any cognizable theory. This Court finds that Plaintiff has failed to state a cause of action in his Complaint for the reasons previously discussed.

Lastly, Defendants seek an Order awarding costs and attorneys fees against Plaintiff pursuant to 22 N.Y.C.R.R. §130 for frivolous litigation. The court, in its discretion, may award any party or attorney in any civil action or proceeding, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees resulting from frivolous conduct. "[T]he authority to impose sanctions or costs is left to the court's sound discretion." (Landes v. Landes, 248 AD2d 268, 269, 670 N.Y.S.2d 188 [1st Dept 1998]). In this case, I find


that Plaintiff's Complaint borders on being frivolous litigation and as tempting as it is, this Court declines to award costs or attorneys fees at this time.

Accordingly, it is hereby

ORDERED, that, the motion by Defendants to dismiss the Complaint against them for failure to state a cause of action is granted.

This constitutes the Decision and Order of the Court.

Dated: August 6, 2015


GEOFFREY D. WRIGHT

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court