Tsang v Dong
2016 NY Slip Op 31575(U)
August 18, 2016
Supreme Court, New York County
Docket Number: 150970/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. Justice

PART 35

Tsang, Bernice
-v-
Dong, Yonghan

INDEX NO. 150970/16
MOTION DATE 6/14/16
MOTION SEQ. NO. 001

The following papers, numbered 1 to ____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

In this action for defamation and trespass, defendant Yonghan Dong ("defendant") moves for summary judgment dismissing the complaint of the plaintiffs Bernice Tsang and Ivanka Wang as agents of Mertz, Bitelman & Associates Law Office, P.C. (the "Firm"), plus costs and disbursements, for payment of a money judgment issued against the Firm in favor of defendant in a separate matter, and an award on defendant's counterclaims.

Factual Background

Plaintiffs, managers of the Firm, allege that in July 2008, defendant contacted the Firm seeking an attorney to represent him in a personal injury matter. The Firm referred defendant to Michael Wiseberg ("Wiseberg") and introduced defendant to Wiseberg on July 14, 2008 in the Firm's office. Wiseberg and defendant signed a retainer agreement, and collected $200 from defendant for travel and parking expenses. Though the Firm did not practice personal injury law and did not consent to inclusion, Wiseberg added the Firm's name to the retainer agreement. Wiseberg alone handled defendant's matter.

On two occasions, when defendant called the Firm to reach Wiseberg and was advised that the Firm was not involved in the matter, defendant came to the Firm and harassed and insulted plaintiffs. In particular, defendant stated, in front of the Firm's clients, that the Firm was irresponsible, caused him to lose his case, and would not let him see Wiseberg; he also stated that he would not leave the office until he saw Wiseberg. As a result, the Firm's clients were disturbed, which resulted in a loss of business of at least $87,000.00, as well as damage to the Firm's reputation.

Dated: _____ _____, J.S.C.

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

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

On January 21, 2016, defendant then claimed that plaintiffs or the Firm's staff signed his name on a stipulation.

As a result, plaintiffs commenced this action against defendant for defamation, defamation *per se,* and trespass, based on defendant's statements made in the Firm's reception area in front of the Firm's clients, threat to remain "in the office forever," and refusal to leave after being asked to leave the office.

In support of dismissal of the complaint, defendant contends that in 2007, he obtained a judgment in his favor against the driver of a vehicle (the "offending driver") which caused defendant property damages.[1] When the offending driver sought to vacate the judgment, claiming he did not receive the summons and complaint, defendant hired Wiseberg on July 14, 2008 pursuant to a Fee and Retainer Agreement (the "Retainer Agreement") for the ensuing hearing. According to defendant, the Firm mailed him the Retainer Agreement.[2] Thereafter, on April 16, 2011, the Firm advised defendant of rescheduled discovery, and defendant did not hear anything about the matter until July 10, 2013, when Wiseberg advised defendant that he was no longer with the Firm and for defendant to contact the Firm for further information. From July 2013 through October 2013, defendant was unable to obtain satisfactory answers as to the status of his case. On December 19, 2013, when the Firm advised defendant that the Firm no longer was handling his case, defendant visited the Firm's office demanding to speak to the manager.

There, the receptionist threatened to call security, but Ms. "Zhang" gave defendant Wiseberg's contact information in New Jersey as Wiseberg was the attorney of record. When Wiseberg's contact information later proved to be invalid, defendant visited the Firm's office again on October 10, 2014 to obtain Wiseberg's correct contact information. As a result of the Firm's mishandling of his matter, defendant commenced a Civil Court action against Wiseberg and the Firm on October 17, 2014, and obtained a judgment in his favor after trial for $519.63.

Defendant argues that the defamation claim is time-barred under the one-year statute of limitations as to any statements made prior to one year before this action was filed on February 4, 2016. Also, the claim is subject to dismissal for failure to allege the date and time of the alleged statements made in the Firm's office. Further, the trespass claim also fails as a matter of law because plaintiffs alleged no physical damage to their office. And, under the doctrine of *res judicata*, plaintiff's claims are barred due to the judgment defendant obtained against the Firm for legal malpractice. Plaintiff's claims against defendant arise from defendant's in-person inquiry about the Firm's abandonment of his case. In support of judgment on his counterclaims, defendant requests (1) damages of $8,009.00 for the Firm's negligence resulting in "the loss of" the case for which defendant was initially awarded judgment against the offending vehicle; (2) $95,000 for psychological damages resulting from the Firm's abandonment of his matter, and (3) payment of $519 as directed in the Civil Court Judgment.

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[1] Defendant asserts that in November 2006, he was involved in a motor vehicle accident in Queens, and filed a Civil Court action against the owner of the offending vehicle in Queens County for property damages. Defendant obtained a judgment in his favor for approximately $8000 in 2007.

[2] The Retainer Agreement is between defendant and Michael Wiseberg, Esq. of "Mertz, Bitelman & Associates, P.C.," the Firm at issue herein, in connection with "property damages."

In opposition, plaintiffs contend that defendant made the defamatory statements when he visited the Firm's office during "the latter part of 2015." Further, the doctrine of *res judicata* does not apply. Defendant's motive in visiting the Firm's office to obtain information about his matter, which resulted in a judgment for the return of monies he paid under the Retainer Agreement, does not preclude the Firm from suing him for tortious acts he committed during such visit. And, since defendant created a disturbance in the office after being told to leave, defendant committed a trespass and nominal, punitive, and treble damages may be sought.

In reply, defendant argues that plaintiffs' opposition fails to set forth any specificity as to the dates he allegedly visited the office and cannot overcome his documentary evidence showing that his visits were beyond one year prior to the filing of this action. Defendant's filing of his lawsuit against the Firm on October 17, 2014 belies plaintiffs' assertion that defendant visited the Firm's office in the latter of 2015.

Discussion

It is well settled that where a defendant is the proponent of a motion for summary judgment, the defendant must establish that the "cause of action . . . has no merit" (CPLR 3212[b]) sufficient to warrant the court as a matter of law to direct judgment in its favor (*Friedman v BHL Realty Corp.*, 83 AD3d 510, 922 NYS2d 293 [1st Dept 2011]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Thus, the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Madeline D'Anthony Enterprises, Inc. v Sokolowsky*, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012] *citing Alvarez v Prospect Hosp.*, 68 NY2d 320, 501 NE2d 572 [1986] *and Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Powers ex rel. Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action (CPLR 3212 [b]; *Farias v Simon*, 122 AD3d 466 [1st Dept 2014]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose" (*Kosovsky v. Park South Tenants Corp.*, 45 Misc.3d 1216(A), 2014 WL 5859387 [Supreme Court New York County 2014] *citing Zuckerman*, 49 NY2d at 562).

The opponent "must assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial ... and it is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] *lv to appeal denied*, 24 NY3d 917 [2015] *citing Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]). In other words, the "issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*American Motorists Ins. Co. v Salvatore*, 102 AD2d 342, 476 NYS2d 897 [1st Dept 1984]; *see also Armstrong v Sensormatic/ADT*, 100 AD3d 492, 954 NYS2d 53 [1st Dept 2012]).

As to plaintiff's trespass claim, defendant's motion to dismiss this claim on the ground that plaintiffs failed to assert any damages to their property, lacks merit. "Any unauthorized entry upon the land of another constitutes a trespass, without regard to the amount of force used, and *even though no damage is done*, since at least nominal damage is always presumed from a

trespass on land (*Butler v Ratner*, 173 Misc2d 783, 662 NYS2d 696 [City Court, City of New Rochelle 1997] (awarding $1.00 as nominal damages") (emphasis added)). Therefore, the absence of any physical damage to the Firm's office does not preclude a claim of trespass.

Further, plaintiff's trespass claim alleges that defendant remained in the Firm's office after permission to remain was withdrawn and, therefore, it cannot be said that the trespass claim is identical to the defamation claim against defendant. Therefore, dismissal of the trespass claim on the grounds noted above is denied.

However, as to plaintiff's defamation claim, defendant established that such claim is time-barred. It is uncontested that the Statute of Limitations for a defamation action is one year (*see*, CPLR 215[3]). Where an issue of fact exists as to "when the allegedly defamatory" conversation took place and whether the action was timely commenced, summary judgment based on the statute of limitations cannot be granted (*Karam v First American Bank of New York*, 190 AD2d 1017, 593 NYS2d 640 [3d Dept 1993]).

Starting with the complaint, plaintiffs admit that the "plaintiff" introduced defendant to Wiseberg in the Firm's office in July 2008, but that the Firm's name was added to the Retainer Agreement without the Firm's consent. The Complaint next alleges, in general terms, that "*From time to time* thereafter" [after 2008] when defendant called the Firm to contact Wiseberg, "Plaintiff" provided defendant with Wiseberg's address, and telephone and facsimile numbers since Wiseberg "solely represented" defendant, not the Firm (¶12) (emphasis added). Particularly, "*On at least two occasions*," defendant came to the office and uttered the aforementioned alleged defamatory statements in front of the Firm's old and new clients (¶¶12-13) (emphasis added). *No dates are given in the Complaint as to when such statements were made.*

The record, however, demonstrates that the Firm's name appears on defendant's credit card statement showing that the Firm received the $200 on July 14, 2008, consistent with the fee stated in the Retainer Agreement, and that an April 16, 2011 email was sent from the Firm to defendant regarding his deposition. The record also contains a stipulation dated May 26, 2011 directing defendant's deposition by September 8, 2011.

Defendant insists that those two occasions were on December 19, 2013 and October 10, 2014, and submits two business cards containing Wiseberg's contact information with dates handwritten on them as evidence of these two visits. It is undisputed that plaintiffs gave defendant the two business cards, and that the business cards bear Wiseberg's name, New Jersey address, and New Jersey telephone and facsimile numbers. It is also uncontested (and the record demonstrates) that defendant commenced his legal practice action against the Firm on October 17, 2014, and prevailed against the Firm in obtaining a judgment in the amount of $519.63. Notably, in that action, Wiseberg denied appearing on behalf of defendant in defendant's underlying matter, and asserted that the Firm maintained defendant's file and appeared in the action on defendant's behalf. (The Firm filed a Notice of Appeal of the Judgment).

Now, in opposition to the motion, plaintiffs claim that defendant's office visits were in "the latter of 2015." Such general averments fail to raise an issue of fact to defeat defendant's *prima facie* showing that the alleged statements were made within one year prior to the commencement of this action (*see Seymour v New York State Elec. & Gas Corp.*, 215 AD2d 971, 627 NYS2d 466 [3d Dept 1995] (finding that affiant's own, unsubstantiated "general averments"

of alleged defamatory statements made "'[o]n several occasions in the Fall of 1992" and "prior to his suspension on November 5, 1992," "fail to raise a triable issue of fact to defeat defendants' prima facie showing"); *Stephan v Cawley*, 24 Misc 3d 1204(A), 890 NYS2d 371 [Sup Ct, NY County 2009] (finding that complaint which "simply offers that the commentary occurred some time before July 18, 2008" failed to specify any time of communication of the alleged defamatory material with particularity")).

Therefore, plaintiffs' defamation claim is barred under the Statute of Limitations.

Nevertheless, as defendant argues, plaintiffs' defamation and trespass claims are barred by *res judicata*. Under New York's transactional approach analyzing a defense based on *res judicata*, "[O]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v City of Syracuse*, 54 NY2d 353, 357, 445 NYS2d 687, 429 NE2d 1158). And, as relevant herein, "res judicata bars not only those claims that were actually litigated previously, but also those which might have been raised in the former action" (*Bernstein v State*, 129 AD3d 135, 810 NYS3d 752 [3d Dept 2015] *citing Moss v Medical Liab. Mut. Ins. Co.*, 224 AD2d 762, 763, 636 NYS2d 948 [1996] (finding that plaintiff attorney's present claims against the State of New York, that he had a valid retaining lien on the subject funds, "stem from his previously adjudicated disbarment, for which a final judgment on the merits was rendered. As such claims could have been raised during plaintiff's disbarment proceeding")).

Here, plaintiffs' defamation and trespass claims stem from the same scope of legal representation that gave rise to defendant's previous legal malpractice claim against plaintiffs. As such, plaintiffs could have raised the statements made and actions performed by defendant during the course of that same legal representation as a defense or counterclaim to the legal malpractice suit.

Defamation is "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" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 987 NYS2d 37; *Foster v Churchill*, 87 NY2d 744, 751, 642 NYS2d 583, 665 NE2d 153 [1996]). To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm (*see Dillon v City of New York*, 261 AD2d 34, 38, 704 NYS2d 1 [1st Dept 1999]).

Defendant's statements concerning the Firm's mishandling of his matter also serve as a basis for defendant's legal malpractice claim against plaintiff, meaning that the statements' falsity could have been litigated during the legal malpractice proceeding (*see e.g. Afshari v Barer*, 1 Misc3d 57, 769 NYS2d 687 [Sup Ct, App Term 2nd and 11th Jud Dist 2003] (former client, *pro se*, sued attorney to recover sum of money that attorney had allegedly retained as his fee while handing a real estate closing for said client, and attorney counterclaimed for libel based on defamatory letter sent to attorney and attorney's former counsel); *Williams v Varig* Brazilian

Airlines, 169 AD2d 434, 564 NYS2d 328 [1st Dept 1991]).[3]

In order to state a claim for civil trespass, plaintiff must assert that "the person, without justification or permission, either intentionally entered upon another's property, or, if entry was permitted, *that the person refused 'to leave after permission to remain ha[d] been withdrawn'*" (*Jones v Maples*, 1999 WL 1427659 [Sup Ct, NY County 1999] *citing Rager v McCloskey*, 305 NY 75, 79 [1952] (emphasis added) ("while [defendant] Dickstein's original entry may have been lawful . . . the allegations that he refused repeated requests to leave and persisted in remaining there for a not inconsiderable period suffice to charge a trespass by Dickstein"; *Wimmer v Greenleaf Arms, Inc.*, 33 Misc 3d 1234(A) [Sup Ct, Richmond County 2011]).

Inasmuch as defendant's alleged trespass at the Firm's office occurred during the alleged period of legal representation of defendant, and it is uncontested that he visited the office to ascertain the status of his matter, plaintiffs could have litigated the trespass claim in defense or as a counterclaim in the legal malpractice action, as well.

Therefore, plaintiffs, as agents of the Firm, are barred under the theory of res *judicata* from asserting a defamation and trespass claim against defendant. As such, these claims are dismissed.

As to defendant's request for judgment on his counterclaims, defendant established entitlement to an order directing plaintiffs, as agents of the Firm, to pay the judgment owed to him. It is uncontested that the Firm failed to pay the Judgment issued against it. Therefore, summary judgment on the branch of defendant's counterclaim seeking payment of said Judgment is granted. However, at this juncture, defendant has failed to establish entitlement to the damages of $8009.00 "for the case loss," and for psychological damages he seeks based on the Firm's alleged abandonment of his matter. As such, the branch of his motion for summary judgment for such damages is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Yonghan Dong for summary judgment dismissing the complaint of the plaintiffs Bernice Tsang and Ivanka Wang as agents of Mertz, Bitelman & Associates Law Office, P.C., plus costs and disbursements, for payment of a money judgment issued against the Firm in favor of defendant in a separate matter, and an award on defendant's counterclaims is granted to the extent that the complaint is severed and dismissed and to the extent that defendant's counterclaim for $519.00 is severed and granted; and it is further

ORDERED that the Clerk may enter judgment severing and dismissing the complaint in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment on defendant's severed counterclaim in favor of defendant Yonghan Dong and against plaintiffs Bernice Tsang and Ivanka Wang as agents of Mertz, Bitelman & Associates Law Office, P.C., joint and severally, in the amount of $519.63 plus statutory interest from February 5, 2016, plus costs and

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[3] Arguably, given that a judgment was entered in favor of plaintiff in the legal malpractice action, the underlying truth of the statements – that is, whether plaintiffs abandoned defendant's case – were litigated to some degree.

disbursements, and that defendant have execution therefor; and it is further

ORDERED that defendant serve a copy of this order with notice of entry upon plaintiffs within 30 days of entry.

This constitutes the decision and order of the court.

DATED: 8/18/16

J.S.C.

HON. CAROL R. EDMEAD
J.S.C.

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