Jacobs v Oh
2017 NY Slip Op 31214(U)
June 5, 2017
Supreme Court, New York County
Docket Number: 451495/16
Judge: Manuel J. Mendez

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

PRESENT: HON. MANUEL J. MENDEZ **PART** 13
Justice

LISA JACOBS , individually and doing business as LISA JACOBS FINE ART,

Plaintiff,

-against-

LAWRENCE OH and DANIEL WALSH, THE SCHULHOF COLLECTION LLC, MICHAEL P. SCHULHOF, individually and as Manager of The Schulhof Collection LLC, and the CITY OF NEW YORK,

Defendants.

INDEX NO. 451495/16
MOTION DATE 04-19-17
MOTION SEQ. NO. 002
MOTION CAL. NO. ____

The following papers, numbered 1 to 10 were read on this motion pursuant to CPLR § 3211 [a],[1],[4],[5] and [7] to dismiss the complaint:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits ____cross motion ____	5 - 7
Replying Affidavits ____	8 - 10

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that defendant, Michael P. Schulhof's motion pursuant to CPLR § 3211 [a],[1],[4],[5] and[7], dismissing the causes of action asserted against him in the First Amended Complaint, and pursuant to New York Court Rule §130-1.1 and CPLR §8303-a, sanctioning plaintiff and her counsel for frivolous litigation, is granted only to the extent of dismissing the causes of action against him in the First Amended Complaint. The remainder of the relief sought is denied.

On August 26, 2013 Michael P. Schulhof as the executor of the Estate of Hannelore B. Schulhof, his mother, commenced an action in Supreme Court, New York County, under index number 157797/2013 against Lisa Jacobs individually and doing business as Lisa Jacobs Fine Art (hereinafter in the context of other actions referred to as "Lisa Jacobs"), resulting from the sale of a Basquiat painting. In the action filed under index number 157797/2013 Mr. Schulhof on behalf of the estate asserted causes of action for fraud, breach of contract, restitution, and unjust enrichment, alleging that the sale price of the Basquiat painting was misrepresented as 5.5 million dollars, when it was actually 6.5 million dollars. It was also alleged that an undisclosed 1 million dollars was kept by Lisa Jacobs and that she charged an additional $50,000.00 to the estate for the sale.

On March 31, 2014 Lisa Jacobs filed an Amended Answer in the action filed under index number 157797/2013, asserting counterclaims against Michael P. Shulhof personally including: that Mr. Schulhof acquired her bank account records from Assistant District Attorney Lawrence Oh through a grand jury subpoena and publicly disclosed the information causing an adverse effect; abuse of process, deprivation of due process rights pursuant to 42 USC §§1983 and 1988; and intentional interference with business relations. The counterclaims were dismissed by Justice Charles E. Ramos in a decision on the record on January 14, 2015 (Mot. Exh. D).

On September 12, 2014 Lisa Jacobs commenced a third-party action under index number 595402/2014, asserting causes of action against all of the named defendants in this action. The third party action asserted claims against Michael P. Shulhof, under the fourth cause of action for violation of NY CPL §190.24[4][a] for the illegal use of

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

information obtained from a grand jury subpoena to publicly disclose confidential information; a twelfth cause of action for breach of contract; and a thirteenth cause of action for interference with ongoing business opportunities. With the exception of the twelfth cause of action for breach of contract, the other causes of action in the third-party complaint were dismissed by Justice Charles E. Ramos on March 11, 2015 by a decision on the record (Mot. Exh. F).

By stipulation entered into on March 11, 2015 and "so ordered" on April 2, 2015 the third-party action filed under index number 595402/2014 was severed only as to Lawrence Oh and the City of New York, to be reassigned to a DCM City Part (Reply Exh. C).

On February 27, 2017 Justice Charles E. Ramos Decision and Order on Motion Sequence 007 in the action filed under index number 157797/2013, partially granted a motion for summary judgment against plaintiff on the causes of action for fraud, breach of contract and restitution. The equitable relief was denied. Lisa Jacob's motion for summary judgment was denied in all respects as stated in a February 7, 2017 decision on the record (Reply Exh. A).

Plaintiff commenced this action on August 12, 2016 and subsequently filed the First Amended Complaint asserting a second cause of action for defamation, and a fourth cause of action for tortious interference with economic opportunity against the defendant (Mot. Exh. A). The remainder of the relief is sought against Assistant District Attorney Lawrence Oh and the City of New York.

Michael P. Schulhof, Individually and as Manager of the Schulhof Collection LLC (hereinafter referred to as "defendant") makes this motion pursuant to CPLR §3211[a][1], [4], [5] and[7] to dismiss the First Amended Complaint, and pursuant to New York Court Rule §130-1.1 and CPLR §8303-a, sanctioning plaintiff and her counsel for frivolous litigation.

Defendant argues that pursuant to CPLR §215[3] the second cause of action for defamation is subject to a one year statute of limitation and is time-barred warranting dismissal. Defendant claims that allegations of defamation and defamation per se are from comments made to co-defendant Lawrence Oh, an assistant district attorney in Kings County, during a criminal investigation that took place on September 19, 2012. It is also claimed that even if the statements made by defendant were published by Lawrence Oh on June 9, 2014 in Criminal Court, King County, the latest the statute of limitations would have expired is September 22, 2015. It is argued this untimely action commenced on August 12, 2016 is more than a year after the statute of limitations.

Pursuant to CPLR §3211[a][5], an action can be dismissed because it is time barred by the statute of limitations (Education Resources Institute, Inc. v. Hawkins, 88 A.D. 3d 484, 931 N.Y.S. 2d 11 [1st Dept., 2011]). Pursuant to CPLR §215[3], a cause of action for defamation is governed by a one year statute of limitations that accrues from when the alleged statements are uttered (Arvanitakis v. Lester, 145 A.D. 3d 650, 44 N.Y.S. 3d 71 [2nd Dept., 2016]).

Plaintiff has not shown that the second cause of action for defamation is subject to CPLR § 203[d], and relates back to either the action filed under index number 157797/2013 or the third-party action under index number 595402/2014, extending the one year statute of limitations.

CPLR § 203[d] applies the relation back theory to defenses or counterclaims interposed when a pleading is served, that arise out of the same transaction as the claims asserted in the complaint, and that would have been time-barred if an independent action was commenced (Balanoff v. Doscher, 140 A.D. 3d 995, 34 N.Y.S. 3d 154 [2nd Dept., 2016]).

The stipulation "so ordered" on April 2, 2015 severed only those claims in the third-party action filed under index number 595402/2014 that were asserted against

defendants Lawrence Oh and the City of New York, for assignment to the DCM City Part under the same index number (Reply Exh. C). This action filed under its own index number is not an extension of the counterclaims or third-party action, but a separate action. Plaintiff has not previously identified any asserted claims of defamation or defamation per se in either of the actions filed under index number 157797/2013 or 595402/2014. This action is not an extension of the third-party action merely because the same defendants are named. Plaintiff had the opportunity to timely file a claim for defamation before the statute of limitations expired and failed to do so, warranting dismissal of the second cause of action.

Defendant has also shown that the second counterclaim for defamation should be dismissed pursuant to CPLR §3211[a][7], for failure to state a cause of action.

A claim of defamation requires that the plaintiff establish "(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" (Stephanov v. Dow Jones & Co., 120 A.D. 3d 28, 987 N.Y.S. 2d 37 [1st Dept., 2014]).

A district attorney in prosecuting a crime is performing a quasi-judicial function (Moore v. Dormin, 252 A.D. 2d 421, 676 N.Y.S. 2d 90 [1st Dept. 1998]). Pertinent and material statements uttered in the course of a quasi-judicial proceeding are absolutely privileged (Rosenberg v. Metlife, Inc., 8 N.Y. 3d 359, 866 N.E. 2d 439, 834 N.Y.S. 2d 494, [2007] and Stega v. New York Downtown Hospital, 148 A.D. 3d 21, 44 N.Y.S. 3d 417 [1st Dept., 2017]).

The alleged defamatory statements were made by the defendant to Lawrence Oh, the assistant district attorney, as part of a criminal investigation and are privileged. Plaintiff's second cause of action for defamation also fails to state a cause of action because the statements were privileged. Having stated a basis for dismissal of the second cause of action pursuant to CPLR §3211[a][5] and CPLR §3211[a][7], there is no need to address defendant's remaining arguments.

Defendant seeks to dismiss the fourth cause of action for tortious interference with economic opportunity pursuant to CPLR §3211[a][7] arguing that it fails to state an actionable claim and essentially parrots the defamation claim in the second cause of action. Defendant also argues that there is no specificity because the plaintiff failed to allege any specific business relations that were interfered with or identify an economic relationship that would have been entered into but for the alleged wrongdoing. It is claimed that these are only conclusory allegations of defendant's malice.

Dismissal pursuant to CPLR §3211[a][7] requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action has to present facts so that it can be identified and establish a potentially meritorious claim (Leon v. Martinez, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence, or are inherently lacking in credibility will not be presumed to be true and are susceptible to dismissal (Dragon Head LLC v. Elkman, 102 A.D. 3d 552, 958 N.Y.S. 2d 134 [1st Dept.,2013]).

A cause of action for tortious interference with prospective contract rights requires the plaintiff to allege specific facts in support of the claim that "...the defendant directly interfered with a third-party and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff" (Posner v. Lewis, 80 A.D. 3d 308, 912 N.Y.S. 2d 53 [1st Dept., 2010]). The plaintiff is required to establish culpable conduct on the part of the defendant, mere persuasion is not enough where the defendant's motivation for the alleged interference is legitimate economic self-interest (Carvel Corp. v. Noonan, 3 N.Y. 3d 182, 818 N.E. 2d 1100, 785 N.Y.S. 2d 359 [2004]).

Plaintiff labels the fourth cause of action as tortious interference with economic opportunity, but claims it should be for tortious interference with prospective contract rights. Plaintiff concedes the fourth cause of action is not properly stated or pled with specificity, and seeks leave in the opposition papers to amend the complaint. She argues that tortious conduct was stated. Plaintiff has not stated a fourth cause of action for tortious interference with economic opportunity or prospective contract rights, warranting dismissal pursuant to CPLR §3211[a][7]. The proposed amendment does not change the outcome. The proposed amendment is not properly sought and the documentation submitted in support of the relief relies on the time-barred defamation cause of action.

Frivolity as defined by 22 NYCRR 130-1.1, requires conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party. The imposition of sanctions requires a pattern of frivolous behavior (Sarkar v. Pathak, 67 A.D. 3d 606, 889 N.Y.S. 2d 184 [1st Dept. 2009]). Sanctions pursuant to CPLR §8303-a for frivolous counterclaims are only available in personal injury, property damage and wrongful death actions (Browning Ave. Realty Corp. v. Rubin, 207 A.D. 2d 263, 615 N.Y.S. 2d 360 [1st Dept., 1994]). The failure to assert a viable defamation claim does not necessarily result in an finding that plaintiff and counsel acted frivolously to obtain CPLR §8303-a relief (Oguagha v. Ropes & Gray, 38 A.D. 3d 298, 830 N.Y.S. 2d 660 [1st Dept., 2007]).

Plaintiff sought to commence this action for separate claims against defendant directly, instead of in his capacity as executor of the estate. This action was pending before summary judgment was obtained in the action filed under 157797/2013. Defendant has not shown that the plaintiff and her attorney in this action acted frivolously or as part of a pattern in refusing to withdraw the claims. The relief sought pursuant to 22 NYCRR 130-1.1 and CPLR §8303-a is denied.

Accordingly, it is ORDERED that, Michael P. Schulhof, Individually and as Manager of the Schulhof Collection LLC's motion pursuant to CPLR § 3211 [a][1],[4],[5] and [7], dismissing the causes of action against him in the First Amended Complaint, and pursuant to New York Court Rule §130-1.1 and CPLR §8303-a sanctioning plaintiff and her counsel for frivolous litigation, is granted only to the extent of dismissing the causes of action asserted against him in the First Amended Complaint, and it is further,

ORDERED that plaintiff's second and fourth causes of action asserted in the First Amended Complaint against Michael P. Schulhof, Individually and as Manager of the Schulhof Collection LLC are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought in this motion pursuant to New York Court Rule §130-1.1 and CPLR §8303-a, sanctioning plaintiff and her counsel for frivolous litigation, is denied, and it is further,

ORDERED that Michael P. Schulhof, Individually and as Manager of the Schulhof Collection LLC shall within twenty (20) days from the date of entry of this Order, serve a copy of this Order with Notice of Entry, pursuant to e-filing protocol, on the remaining parties, the Trial Support Clerk in the General Clerk's Office and the Clerk of this Court, and it is further,

ORDERED that the Clerk of the Court enter judgment accordingly.

ENTER:

MANUEL J. MENDEZ,
J.S.C.

Dated: June 5, 2017

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE