SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 42

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ANTHONY ROTONDI

Plaintiff

DECISION AND ORDER

-against-

INDEX NO.: 150097/2015

THE MADISON SQUARE GARDEN COMPANY

Defendant

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NANCY M. BANNON, J.

I. Background

The plaintiff, an equity finance trader, was ejected from his court-side corporate seats at the defendant Madison Square Garden (MSG) on January 7, 2014, for disruptive behavior during a New York Knicks basketball game that he was attending with his supervisor at ING Financial Services (ING) and their clients, some of which was directed at Carmelo Anthony, a Knicks player. He was escorted from his seat by MSG security personnel, arrested by the New York City Police Department (NYPD), and charged with criminal trespass in the third degree and tampering with a sports contest in the second degree. He was terminated from his employment two days later. The plaintiff denies any inappropriate behavior, and claims to have merely stated "Carmelo, you stink," after the Knicks "squandered a fourteen point lead" during the fourth quarter of the game against the Detroit Pistons.

In a prior proceeding, this court denied the plaintiff's application for pre-action discovery pursuant to CPLR 3102(c), which sought the identity of every MSG employee who communicated with the NYPD or ING regarding his conduct at the basketball game, and directing a deposition of such employees. In denying the application, the court, inter alia, found that the plaintiff did not establish a potentially meritorious cause of action, since "any defamation claim against MSG security personnel based upon statements made or information provided to the police is questionable at best since most such communications are privileged. See Toker v Pollak, 44 NY2d 211 (1978); Wilson v Erra, 94 AD3d 756 (2nd Dept. 2012); Levy v Grandone, 14 AD3d 660 (2nd Dept. 2005); Mestiti v Wegman, 307 AD2d 339 (2nd Dept. 2003),"

and because the fact that the plaintiff's "supervisor was present at the game, sitting with the petitioner in ING corporate seats, makes it unlikely that it was any subsequent communications by an employee of the respondent with ING that caused the petitioner's termination."

The plaintiff thereafter commenced this action against MSG, seeking damages under theories of defamation, false imprisonment and false arrest, negligence, tortious interference with business relations, prima facie tort, and intentional infliction of emotional distress. The gravamen of the complaint is that the defendant made false statements to the police department, which resulted in his arrest, and to ING, which resulted the termination of his employment. MSG now moves, pre-answer, pursuant to CPLR 3211(a)(7), to dismiss the complaint in its entirety on the ground the complaint fails to state a cause of action. The plaintiff opposes the motion. The motion is granted in part.

II. Discussion

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232nd Owners Corp. v Jennifer Realty Co., supra, at 152 (internal quotation marks omitted); see Leon v Martinez, supra; Guggenheimer v Ginzburg, 43 NY2d 268 275 (1977).

Where, however, the court considers evidentiary material, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (Guggenheimer v Ginzburg, supra, at 275), but it must be "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it." Id. "[B]are legal conclusions and factual claims which are flatly contradicted by the evidence are not presumed to be true on such a motion." Palazzolo v Herrick, Feinstein, LLP, 298 AD2d 372, 372 (2nd Dept. 2002); see Guggenheimer v Ginszburg,

supra; Rivietz v Wolohojian, 38 AD3d 301 (1st Dept. 2007); Beattie v Brown & Wood, 243 AD2d 395 (1st Dept. 1997). "If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." Peter F. Gaito Architecture, LLC v Simone Development Corp., 46 AD3d 530, 530 (2nd Dept. 2007).

A. Defamation

The amended complaint includes two causes of action to recover for defamation, one concerning statements allegedly made by the defendant to the NYPD, and another concerning statements allegedly made by the defendant to ING. In essence, the plaintiff alleges that "MSG falsely accused him of interfering with the basketball game and for refusing to leave after being ejected." He also asserts that, on the day after the basketball game, "MSG compounded" his injuries "by communicating these and other false and defamatory statements about" the plaintiff "to his employer, ING." Specifically, the plaintiff states that MSG Vice President Courtney Jeffries telephoned Elaine Clark, who had accompanied the plaintiff to the game and apparently witnessed the plaintiff's behavior, and asserted that the plaintiff was disorderly and used vulgar and abusive language, interfered with the game, became abusive with MSG security personnel, refused to produce his ticket when asked, and refused to exit MSG after he was ejected from the facility.

"The elements of a cause of action [to recover damages] for defamation 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." Caccione v Scarpinato, 137 AD3d 857, 859 (2nd Dept. 2016) quoting Epifani v Johnson, 65 AD3d 224, 233 (2nd Dept. 2009). "To establish actionable defamation, it must be shown that the facts are false and that their publication was generated by actual malice, i.e. with a purpose to inflict injury upon the party defamed, or in a grossly irresponsible manner." Kuan Sing Enterprises, Inc. v T.W. Wang, Inc., 86 AD2d 549, 550 (1st Dept. 1982), affd 58 NY2d 708 (1982), citing Chapadeau v Utia Observere-Dispatch, Inc. 38 NY2d 196 (1975). To impose liability in a defamation action commenced by a person who is not a public figure, in connection with a matter of public concern, "the party defamed must establish by preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Chapadeau v Utica Observer-Dispatch, supra, at 199; see Huggins v Moore, 94 NY2d 296 (1999); Farber v Jefferys, 103 AD3d 514 (1st Dept. 2013). A person is grossly irresponsible in this regard when he or she fails to verify the

accuracy or veracity of information before disseminating it (see Matovcik v Times Beacon Record Newspapers, 108 AD3d 511 [2nd Dept. 2013]), or evinces an inability or unwillingness to take any steps to obtain such a verification. See Fraser v Park Newspapers of St. Lawrence, Inc., 246 AD2d 894 (3rd Dept. 1998). CPLR 3016(a) provides that, "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally."

Although the amended complaint specifies the particular words used, sets forth the time when the subject statements were made, and identifies both the declarant and the audience of the allegedly defamatory statements, the allegations are simply insufficient to support a cause of action to recover for defamation against MSG.

As explained above, any defamation claim against MSG security personnel based upon statements made or information provided to the police or other officials is privileged. See Toker v Pollak, supra. Thus, in Phelan v Huntington Tri-Vil. Little League, Inc. (57 AD3d 503 [2nd Dept. 2008]), the chief umpire of a little league wrote to a municipal parks department that the plaintiff, a little league baseball coach, engaged in "unacceptable and despicable language and behavior." Id. at 504. In summarily dismissing the coach's defamation claim, the Court concluded that "[t]he communications at issue were entitled to a qualified privilege." Id. at 505. Moreover, the statements made by MSG's vice present to the plaintiff's supervisor on the day after the incident mostly consisted of assertions that the plaintiff was abusive and interfered with the game. These types of statements are nonactionable statements of opinion. See Colantonio v Mercy Med. Ctr., 73 AD3d 966 (2nd Dept. 2010) (statements by coworkers that the plaintiff physician was belligerent, very unreasonable, inappropriate, and created havoc were nonactionable statements of opinion); Farrow v O'Connor, Redd, Gollihue & Sklarin, LLP, 51 AD3d 626 (2nd Dept. 2008) (statement constituting a subjective characterization of the plaintiff's behavior was a nonactionable statement of opinion).

Although the statements that the plaintiff refused to produce his ticket when asked, and refused to leave MSG after being ejected therefrom, are statements of fact, they are not actionable even if untrue, since the statements were not made in a "grossly irresponsible manner." In addition, as explained above, since the plaintiff's supervisor witnessed his conduct in this regard, the complaint fails to set forth allegations sufficient to support the plaintiff's claim that these statements by MSG's vice president to his supervisor proximately caused him to sustain special damages by virtue of his termination from employment.

Consequently, the first and fourth causes of action, which seek to recover for

defamation, must be dismissed.

B. False Imprisonment and False Arrest

The plaintiff's allegations that the defendant knowingly "gave false statements to the police with the intent of having plaintiff arrested" (D'Amico v Correctional Med. Care, Inc., 120 AD3d 956, 961 [4th Dept. 2014]), along with his allegations that he was then detained for a period of time, arrested, and charged with several offenses, sufficiently support his claim that the defendant possessed the requisite intent to cause his confinement, that he was conscious of the confinement, that he did not consent to the confinement, and that the defendant lacked privilege to cause the confinement. The plaintiff thus stated a cause of action to recover for false arrest and false imprisonment. See Broughton v State of New York, 37 NY2d 451 (1975); Mesiti v Wegman, 307 AD2d 339 (2nd Dept. 2003).

As such, that branch of the defendant's motion which is to dismiss the second cause of action, which alleges false imprisonment and false arrest, must be denied.

C. Negligence

As the defendant correctly contends, the complaint wholly fails to allege any cognizable claim of negligence against it. To establish negligence, the plaintiff must prove that the defendant owed him a duty of care and breached that duty, and that the breach proximately caused his injuries. See Solomon v City of New York, 66 NY2d 1026 (1985); Wayburn v Madison Land Ltd. Partnership, 282 AD2d 301 (1st Dept. 2001). The complaint does not identify what duty was owed by MSG to the plaintiff, and how it breached that duty. Generally, where the owner of a facility open to the public demands that a patron leave its premises for inappropriate behavior, the manner in which the owner compels the patron to leave does not give rise to a cause of action sounding in negligence. See e.g., Graytwig Inc. v Dryden Mut. Ins. Co., 149 AD3d 1424 (3rd Dept. 2017). Rather, they generally involve allegations of intentional acts. Here, the crux of the plaintiff's allegations is that the defendant committed intentional acts against him, and these allegations are totally inconsistent with his contention that the defendant's carelessness proximately caused him to be arrested, confined, prosecuted, and terminated from employment. See Allstate Ins. Co. v Mugavero, 79 NY2d 153 (1992); Atlantic Mut. Ins. Co. v Terk Techs. Corp., 309 AD2d 22 (1st Dept. 2003).

Consequently, the third cause of action, which seeks to recover for negligence, must be dismissed.

D. Tortious Interference With Business Relations

To state a claim for tortious interference with business relations, the plaintiff must plead "(1) that [he] had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference caused injury to the relationship with the third party." Amaranth LLC v J. P. Morgan Chase & Co., 71 AD3d 40, 47 (1st Dept. 2009). Malice in this context means "that the conduct by defendant that allegedly interfered with plaintiff's prospects [ ] was undertaken for the sole purpose of harming plaintiff." Jacobs v Continuum Health Partners, Inc., 7 AD3d 312, 313 (1st Dept. 2004); see Alexander & Alexander of N.Y., Inc. v Fritzen, 68 NY2d 968 (1986). Since the allegations in the amended complaint do not constitutes facts tending to support the plaintiff's claim that MSG acted with disinterested malice in communicating with the plaintiff's supervisor, or that it committed a crime or independent tort in doing so, the plaintiff fails to state a cause of action to recover for tortious interference with business relations.

Therefore, the fifth cause of action, which seeks to recover for tortious interference with business relations, must be dismissed.

E. Prima Facie Tort and Intentional Infliction of Emotional Distress

Prima facie tort affords a remedy for "the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful." Freihofer v Hearst Corp., 65 NY2d 135, 142 (1985) (citation and internal quotation marks omitted); see ATI, Inc. v Ruder & Finn, 42 NY2d 454 (1977). The tort of intentional infliction of emotional distress "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., 81 NY2d 115, 121 (1993)

The causes of action for prima facie tort and intentional infliction of emotional distress must be dismissed as duplicative of other causes of action. These claims "fall within the ambit of other traditional tort liability," specifically, the plaintiff's defamation causes of action. Fleischer v NYP Holdings, Inc., 104 AD3d 536, 538 (1st Dept. 2013). Additionally, these claims do not allege any facts independent of those alleged in connection with the defamation causes of action, or allege distinct damages. See Perez v Violence Intervention Program, 116 AD3d 601 (1st Dept. 2014); Fleischer v NYP Holdings, Inc., supra; Akpinar v Moran, 83 AD3d 458 (1st

Dept. 2011). What is, in effect, a restatement of the amended complaint's defamation causes of action "cannot be made to stand independently as a prima facie tort" since prima facie tort "'should not become a 'catch-all' alternative for every cause of action which cannot stand on its own legs.'" Gertler v Goodgold, 107 AD2d 481, 490 (1st Dept. 1985), affd 66 NY2d 946 (1985), quoting Belsky v Lowenthal, 62 AD2d 319, 323 (1st Dept. 1978), affd 47 NY2d 820 (1979). Nor can the cause of action alleging intentional infliction of emotional distress stand independently of the defamation cause of action (see Matthaus v Hadjedj, 148 AD3d 425 [1st Dept. 2017]), and the dismissal of the defamation cause of action for failure to state a claim requires dismissal of the cause of action to recover fro intentional infliction of emotional distress. See generally Bacon v Nygard, 140 AD3d 577 (1st Dept. 2016).

The plaintiff's cause of action alleging intentional infliction of emotional distress must be dismissed for the additional reason that the plaintiff fails to "allege conduct that approaches the level of outrageousness or extremity necessary to support a claim of intentional infliction of emotional distress." Cecora v De La Hoya, 106 AD3d 565, 566 (1st Dept. 2013); see Howell v New York Post Co., supra; Brown v Sears Roebuck and Co., 297 AD2d 205 (1st Dept. 2002). Although the plaintiff alleges that the defendant made false statements to the police and his employer, such conduct, even if true, is not so extreme, reckless, or outrageous to support such a claim. See Brown v Sears Roebuck and Co., supra.

As such, the sixth cause of action, which seeks to recover for prima facie tort, and the seventh cause of action, which seeks to recover for intentional infliction of emotional distress, must be dismissed.

Accordingly, it is

ORDERED that the defendant's motion to dismiss the amended complaint is granted to the extent that the first, third, fourth, fifth, sixth, and seventh causes of action are dismissed, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: 9/12/17

J.S.C.

HON. NANCY M. BANNON