

Nogueira v B & H Foto & Elecs. Corp.

2018 NY Slip Op 30429(U)

March 9, 2018

Supreme Court, New York County

Docket Number: 159535/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED
Justice

PART 2

-----X

ALEX NOGUEIRA and KATIA AMARAL,
Plaintiffs,

INDEX NO. 159535/2016

- v -

B & H FOTO AND ELECTRONICS CORP.,
Defendant.

MOTION SEQ. NO. 001

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number 9, 10, 11, 12, 13, 16, 17, 20, 21 were read on this motion to/for DISMISSAL

Upon the foregoing documents, it is ordered that the motion is granted and the complaint is dismissed.

In this action by plaintiffs Alex Nogueira and Katia Amaral sounding in intentional and negligent infliction of emotional distress, defendant B & H Foto and Electronics Corp. moves, pursuant to CPLR 3211(a)(7), to dismiss the complaint for failure to state a claim. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, **the motion is granted and the complaint is dismissed.**

FACTUAL AND PROCEDURAL BACKGROUND:

On February 8, 2016, plaintiffs Alex Nogueira (Nogueira) and Katia Amaral (Amaral) (collectively, plaintiffs) residents of Brazil, visited a store operated by defendant B & H Foto and

Electronics Corp. (B & H) located at 420 Ninth Avenue in Manhattan. Doc. 1, at pars. 1, 2, 5.¹ Nogueira purchased certain merchandise at B & H and then left the premises with Amaral. Doc. 1, at pars. 8-14, 15-18. B & H subsequently sent plaintiffs emails accusing them of stealing merchandise from the store. Doc. 1, at pars. 19-29. B & H also threatened to report Nogueira and Amaral to the New York City Police Department as well as to authorities in Brazil. Doc. 1, at pars. 23-25.

On November 11, 2016, plaintiffs commenced the captioned action by filing a summons and complaint.² As a first cause of action, sounding in intentional infliction of emotional distress (IIED), plaintiffs alleged, inter alia, that the threats made by and on behalf of B & H consisted of a “course of harassment and intimidation”, were “extreme and outrageous” and “were intended to cause plaintiffs sever [sic] emotional distress or were made with a disregard of a substantial likelihood that they would cause severe emotional distress”. Doc. 1, at pars. 19, 32-38. As a second cause of action, plaintiffs alleged negligent infliction of emotional distress (NIED). Doc. 1, at pars. 40-42. As a third cause of action, plaintiffs claimed that they were entitled to the legal expenses they incurred “in response to the baseless and unwarranted threats and allegations alleged herein.” Doc. 1, at par. 46.

On February 17, 2017, B & H filed the instant motion seeking to dismiss the complaint due to plaintiffs’ failure to state a cause of action. Docs. 9-12. Plaintiffs oppose the motion. For the reasons set forth below, the motion is granted.

¹ Unless otherwise noted, all references are to the documents filed with NYSCEF in this matter.

² Although the complaint indicates that it is verified, no verification is attached thereto.

LEGAL CONCLUSIONS:

Intentional Infliction of Emotional Distress

[The Court of Appeals] has enumerated four elements of a cause of action for intentional infliction of emotional distress: "(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, 612 NE2d 699, 596 NYS2d 350 [1993]). "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Howell*, 81 NY2d at 122 [internal quotation marks and citation omitted], quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]).

Chanko v Am. Broadcasting Cos. Inc., 27 NY3d 46, 56 (2016).

The Court of Appeals has found the foregoing requirements to be "rigorous, and difficult to satisfy" (citations omitted). *Howell*, 81 N.Y.2d at 122. Indeed, the Court of Appeals has stated that "of the intentional infliction of emotional distress claims [it has considered], every one has failed because the alleged conduct was not sufficiently outrageous" (*Howell*, 81 NY2d at 122 [internal quotation marks and citations omitted and emphasis added])." *Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d at 57.

Here, the IIED claim must be dismissed since plaintiff has not alleged that B & H's conduct surpassed all possible bounds of decency or that its conduct was atrocious or utterly intolerable in a civilized community. *Howell*, 81 NY2d at 122. Nor was the conduct alleged by plaintiffs as against B & H, i.e., accusing plaintiffs of theft, sufficient to sustain such a claim. See *Khan v Reade*, 7 AD3d 311 (1st Dept 2004) (conduct of defendant found not to be extreme, reckless, or

outrageous and IIED claim dismissed where defendant filed police report after suspecting that its employee was stealing its merchandise).³ Thus, the claim for IIED is dismissed.

Negligent Infliction of Emotional Distress

A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety (see *E.B. v Liberation Pubs., Inc.*, 7 A.D.3d 566 [2004]; *Johnson v New York City Bd. of Educ.*, 270 A.D.2d 310, 312 [2000]).

Sheila C. v Povich, 11 AD3d 120, 130 (1st Dept 2004).

Here, plaintiffs do not allege that B & H's conduct endangered their physical safety or caused them to fear for their physical safety. Moreover, plaintiffs' counsel concedes that plaintiffs failed to allege a duty owed to them by B & H. Pltfs.' Aff. In Opp., at par. 37. Thus, plaintiffs' claim for NIED must be dismissed. See *Ferreyr v Soros*, 116 AD3d 407 (1st Dept 2014).

Attorneys' Fees

[I]t is a well-settled rule in New York that attorneys' fees are considered an incident of litigation and, unless authorized by statute, court rule or written agreement of the parties, are not recoverable (*Hooper Assocs. v AGS Computers*, 74 N.Y.2d 487, 491; *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 N.Y.2d 1, 5). In the absence of an explicit statutory or contractual authority therefor, a right to attorneys'

³ The Appellate Division, First Department has recognized that the few claims of IIED it has upheld were supported by allegations "detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff." *Seltzer v Bayer*, 272 AD2d 263, 264-265 (1st Dept 2000). Here, plaintiffs not only fail to set forth such allegations, but plaintiffs' counsel even concedes that, after he was retained in mid-March, 2016, approximately one month after the alleged incident at the store, B & H advised "that the matter would not be pursued" against plaintiffs. Pltfs.' Aff. In Opp., at par. 10.

fees will not be inferred. (*Lawyers' Fund for Client Protection v Morgan Guar. Trust Co. of N.Y.*, 259 A.D.2d 598, 600).

Campbell v Citibank, N.A., 302 AD2d 150, 154 (1st Dept 2003).

Here, since plaintiffs do not set forth any ground for the recovery of attorneys' fees, be it statutory, contractual, or otherwise, they may not recover the same and this claim is dismissed as well.

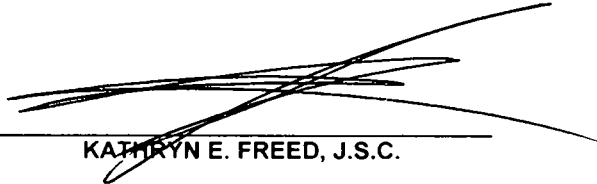
In light of the foregoing, it is hereby:

ORDERED that the motion by defendant B & H Foto and Electronics Corp. is granted in all respects and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that this constitutes the decision and order of the court.

3/9/2018
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input checked="" type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> DO NOT POST		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE