Kopek v Denton
2018 NY Slip Op 34059(U)
January 12, 2018
Supreme Court, Oneida County
Docket Number: EFCA2017-002231
Judge: Bernadette T. Clark

At a term of Supreme Court of the State of New York held in and for the County of Oneida at the Oneida County Courthouse, 200 Elizabeth Street, Utica, New York on the 13th day of December 2017.

PRESENT: HONORABLE BERNADETTE T. CLARK
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

ROBERT J. KOPEK, JR.

Plaintiffs,

-against-

ROBERT J. DENTON, JR. And JULIE GROW DENTON,

Defendant.

DECISION AND ORDER

Index No. EFCA2017-002231
RJI No.: 32-17-0923

APPEARANCES: **John G. Leonard, Esq.**
Attorney for Plaintiff, ROBERT J. KOPEK, JR.

Donald R. Gerace, Esq.
Attorney for Defendant, Julie Grow Denton

Clark, J.

Procedural History

On November 21, 2017, Defendants, Robert J. Denton, Jr. and Julie Grow Denton (hereinafter Defendant, Robert Denton and Defendant Julie Grow Denton) filed a Motion to Dismiss Plaintiff's Complaint pursuant to CPLR 3211(a)(5) and (a)(7); or in the alternative

granting Defendants Summary Judgment; granting Robert J. Denton, Jr. a sealing order for the case file; and granting to Defendant, Julie Grow Denton sanctions against the Plaintiff and Plaintiff's counsel pursuant to 22 NYCRR Section 130. 1.1.

Plaintiff's complaint alleged that both Defendants published a defamatory statement about their daughter's hockey coach "Coach Kopek is a toucher! ☹ Ugg!" to fifty five hockey families via email. After an investigation by the Oneida County District Attorney's Office, Defendant, Robert Denton was charged with Criminal Impersonation, a Class A Misdemeanor. Thereafter, on or about April 13, 2017, Defendant pled guilty to an amended charge of two counts of Harassment 2nd and gave a detailed allocution in Rome City Court where he was questioned by the Assistant District Attorney and the presiding Judge. During the allocution, Defendant, Robert Denton admitted his conduct which included sending out the alleged defamatory email from multiple computers and IP addresses.

On December 6, 2017, Plaintiffs filed an Affirmation in Opposition as well as an Affidavit in Opposition to Defendants' Motion to Dismiss. Plaintiff also filed a Cross-Motion seeking to deny the Motion and for disclosure. Oral argument was held on December 13, 2017 and the Court reserved Decision only on the issue of sanctions. After extensive oral argument by both counsel, the Court dismissed the Cause of Action for Defamation as against Defendant, Julie Grow Denton, since the one year Statute of Limitations had expired at least eight months prior to Plaintiff's Compliant being served on or about November 3, 2017.

In addition, the Court granted Defendants' Motion to Dismiss on the Cause of Action for Negligent Infliction of Emotional Distress based upon the alleged facts in the case. Here, all of the Plaintiff's allegations against *both* Defendants were intentional acts and therefore an action

for Negligent Infliction of Emotional Distress cannot survive. The Court notes that had Plaintiff claimed *Intentional* Infliction of Emotional Distress, which arguably fit the alleged facts, that claim would also have been dismissed since it has a one year Statute of Limitations as well. Moreover, the relevant case law indicates such a claim in the context of a defamation action would be duplicative and also would not survive. *Rozanski v. Fitch,* 113 A.D. 2d 1010 (4th Dep't 1985). In addition, the Court denied Plaintiff's Cross Motion in part as it related to Defendant Julie Grow Denton and granted the Motion in part as it related to Robert Denton, Jr. on the defamation claim. As previously stated the Court reserved Decision on the Defendant Julie Grow Denton's claim for sanctions against Plaintiff and Plaintiff's counsel which is the subject of this Decision and Order.

DECISION AND ORDER

Subpart 130-1 of the New York Rules of the Chief Administrator of the Courts established two distinct categories of fines for frivolous conduct. The first is "costs" which reimburses reasonable attorneys fees and actual expenses incurred as a result of frivolous conduct. The second is "sanctions" which is a sum imposed as punishment. The Court has discretion to grant sanctions up to a maximum of $10,000.00.

It is well settled that if a Court awards either costs or sanctions or both it must be done in a written decision setting forth the offending conduct, why that conduct has been deemed frivolous and why the amount awarded is appropriate. A Court may award costs or impose sanctions upon Motion or sua sponte but the party to be sanctioned must be given a reasonable opportunity to be heard. This opportunity to be heard does not always require a formal hearing but certainly notice and written response, and the option for a hearing, if requested, is required

22 NYCRR 130-1.1

A Court is empowered to simultaneously impose sanctions pursuant to CPLR 8303-1 and 22 NYCRR 130 for frivolous conduct which is defined as conduct that:

> 1) is completely without merit in law and cannot be supported by a reasonable argument for an extension modification or reversal of existing law; 2) is undertaken primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure another, or; 3) asserts material factual statements that are false.

In determining whether the conduct undertaken was frivolous the Court shall consider the circumstances under which the conduct took place including the time available for investigating the legal or factual basis of the conduct. Sanctions awarded under this part should be made after the parties have had an opportunity to be heard. It is important to note that both parties counsel addressed the issue of sanctions during oral argument. Moreover, the Court gave counsel further opportunity to more fully brief the issue, however, both counsel stated at the oral argument that they did not want to make any further submissions and they did not need a hearing.

This is a defamation case where Plaintiff, through a Verified Complaint dated October 17, 2017, alleged, among other things, that Defendant, Julie Grow Denton published the alleged Defamatory statement on February 12, 2016. Based upon the operative facts the Court verily believes that it was or should have been obvious *to any* attorney that a one year Statute of Limitations governs a defamation cause of action. There is no dispute that the alleged conduct occurred on February 12, 2016 and the Verified Complaint was sworn to on October 17th, 2017, one year and eight months later. Thus, when the Complaint was verified on October 17, 2017, alleging that Defendant, Julie Grow Denton committed a defamation it was frivolous conduct because the Statute of Limitations had been expired for eight months and there was no basis in fact or law and no reasonable argument could be made to extend, modify or reverse the existing law. Thus, filing a Complaint against someone under these circumstances was clearly frivolous.

However, the inquiry does not end there, because CPLR §215(8) does allow for tolling the Statute of Limitations under limited circumstances. On March 6, 2017, Defendant, Robert Denton, Jr. was charged in Rome City Court with identity theft in the 3rd Degree, a Class A Misdemeanor which was later reduced to harassment 2nd Degree, a violation. Defendant, Robert Denton, Jr, pled guilty to two violations on April 13, 2017. During his allocution, Defendant, Robert Denton, Jr., *admitted* to sending the alleged defamatory emails on February 12, 2016 regarding the Plaintiff. Not only was Plaintiff present in Court during the allocution, he had a copy of the certified transcript of the allocution. As a result, Plaintiff and his attorney were very aware on April 13, 2017 that Defendant, Robert Denton, Jr. admitted to all of the conduct on the dates alleged in the Complaint. This is the very same conduct which the Complaint alleges was done by Defendant, Julie Grow Denton. Moreover, both the Plaintiff and Plaintiff's attorney were well aware that Defendant, Julie Grow Denton was *never* charged with any crime or violation after an extensive investigation which included an expert forensic evaluation relating to this matter. Thus, Plaintiff and his attorney *knew* or *should have known* that the tolling provisions in N.Y. CPLR §215(8) would certainly not apply to Defendant, Julie Grow Denton to extend the Statute of Limitations to run from the date the criminal action was resolved. Yet in spite of that knowledge the Plaintiff and his attorney filed a *Verified* Complaint on or about October 17, 2017 suing Defendant, Julie Grow Denton for Defamation and Negligent Infliction of Emotional Distress. It is important to note that both the attorney and the Plaintiff signed a certification pursuant to 22 NYCRR §130-1 indicating that the contentions contained in this document were *not* frivolous.

In response to Defendants' Motion to Dismiss in his attorney affirmation dated December 6, 2017, in paragraph 8, it states:

"I read the allegations of Attorney Gerace that Attorney John Dillon who represented

> Rome Youth Hockey Association in an action brought by Julie Grow Denton purportedly stated that "Mrs. Denton did know wrong." I have never spoken with Attorney John Dillon about Robert Kopek's civil case and did not authorize Attorney Dillon to make such representation. In fact *after* Robert J. Denton, Jr's. arrest I was contacted by Robert J. Kopek regarding a civil action and it has always been our intention to bring an action against both Robert and Julie Grow Denton." (Emphasis added).

Once again, this is six months after Defendant, Robert Denton admitted to sending all of the emails.

Thereafter, in the next paragraph which is the *Wherefore clause* without any legal reason or explanation it states "the Plaintiff respectfully requests that the Court dismiss the defamation cause of action against Julie Grow Denton.

The Court finds Plaintiff's request at this stage of the litigation *after* receiving the Defendant's Motion to Dismiss, to be wholly inadequate and contrary to his legal obligation and responsibility as an attorney. There can be no doubt that under these facts and circumstances an attorney who certified that an action was not frivolous after reasonable inquiry knew or should have known that the Statute of Limitations had been expired for eight months at the time he sued this case against Defendant, Julie Grow Denton. The Court, finds that the Attorney's conduct was frivolous as defined under 22 NYCRR 130-1.1 in that an action for defamation against Defendant, Julie Grow Denton, was completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law. Certainly, the one year Statute of Limitations for a Defamation case is well settled and known at least by the second semester of a first year law student. Moreover, as of March 6, 2017, the investigation which according to the pleadings, Plaintiffs were kept apprised of, culminated in the arrest of Defendant, Robert Denton. Most importantly in this Court's view, the plea allocution on April 13, 2017, at which the Plaintiffs were present, confirmed that Defendant, Julie Grow Denton, did not send the email on February 12, 2016, as alleged in the Complaint six months later. Thus, as

of April 13, 2017 there was no reasonable or even a remotely possible belief that Defendant, Julie Grow Denton, would be charged with a crime that would have tolled the one year Statute of Limitations pursuant to CPLR §215(8).

Accordingly, based upon the facts and circumstances in this case the Court finds that Attorney Leonard's conduct in suing Defendant, Julie Grow Denton for defamation eight months after the one year Statute of Limitations expired was frivolous conduct under 22 NYCRR 130-1.1. Therefore, the Court finds, that under these circumstances the appropriate remedy is to compensate Defendant, Julie Grow Denton for having to incur costs and legal fees to defend this action by filing the Motion to Dismiss. Defendants' counsel is directed to file an Affirmation of his costs and fees only with respect to his defense of Defendant, Julie Grow Denton, within 30 days on notice to Plaintiff's attorney. Plaintiff's attorney will be entitled to respond and request a hearing on the amount of attorney's fees within 30 days after receipt of Defendants' Affirmation.

Moreover, the Court awards sanctions in the amount of $500.00 to be paid by Plaintiff's Attorney within 30 days of this Order. Payment is to be made to "Oneida County Supreme Court" and thereafter payment will be forwarded to the Lawyers Fund for Client Protection of the State of New York. It is, hereby

ORDERED that pursuant to NY CPLR 8303-1 and 22 NYCRR 130-1.1, the Court awards sanctions for frivolous conduct against Plaintiff's attorney in the amount of $500.00 to be paid within 30 days of this Order to Oneida County Supreme Court which will forward the payment to the Lawyers Fund for Client Protection of the State of New York; and it is further

ORDERED that pursuant to N.Y. CPLR 8303-a and 22 NYCRR 130-1.1, Plaintiff's attorney shall pay reasonable attorney fees for frivolous conduct to Defendant, Julie Grow Denton for the defense of this action to be determined as set forth above.

This shall constitute the Decision and Order. The original Decision and Order is returned to the attorney for the Plaintiff. All other papers are being delivered by the Court to the County Clerk for filing. The signing of this Decision, Order does not constitute entry or filing under CPLR Rule 2200. Counsel is not relieved from the applicable provisions of that rule respecting filing, entry and notice of entry.

ENTER: January 12, 2018
Utica, New York.

Hon. Bernadette T. Clark
Supreme Court Justice