Rossi v Johnston
2020 NY Slip Op 31852(U)
June 15, 2020
Supreme Court, New York County
Docket Number: 154491/2017
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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PAOLO ROSSI

Plaintiff,

- v -

KERRI-ANN JOHNSTON,

Defendant.

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INDEX NO. 154491/2017

MOTION DATE N/A

MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 79, 80, 81, 82, 83, 84, 87, 88, 89, 90, 91, 96, 97

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this action for punitive damages based on allegations of the malicious prosecution of a criminal action (Doc. 1), defendant Kerry-Ann Johnston ("Johnston") moves, pursuant to CPLR 3025, to amend her answer in this action to assert counterclaims based on theories of intentional infliction of emotional distress ("IIED"), abuse of process and prima facie tort (Docs. 79-84, 91, 97). Plaintiff Paolo Rossi ("Paolo") opposes the motion (Docs. 89, 96). After a review of the parties' contentions, as well as the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

The underlying facts of this case are set forth in detail in the decision and order entered on February 27, 2019 ("the 2/27/19 order"), which denied Johnston's motion for summary judgment seeking dismissal of the complaint (Doc. 50). Briefly summarized, this action stems from allegations that Johnston falsely accused Rossi, her ex-husband, of violating an existing order of protection in 2017, resulting in his arrest and a charge for criminal contempt in the second degree

in violation of Penal Law § 215.50 (3) (Doc. 50 at 3). However, the office of the New York County District Attorney ("DA") later dismissed the criminal complaint against Rossi after video surveillance of the parties' interaction revealed that Rossi had maintained his distance and had not violated the order of protection (Doc. 50 at 3).

Rossi commenced this action in May 2017, asserting a claim for malicious prosecution against Johnston (Doc. 1). In June 2017, Johnston interposed an answer, wherein she asserted two affirmative defenses (Doc. 2). Johnston claimed that:

> "[o]n April 30, 2015 [t]he Superior Court of California County of Los Angles . . . issued an [o]rder [o]f [p]rotection in favor of [Johnston] requiring [Rossi] to refrain from [h]arassing, assaulting, contacting, threatening and coming within twenty-five yards of [her]" (Doc. 2 at 1-2) (first affirmative defense).
>
> "[Rossi] has a history of both mental and physical abuse of [Johnston] resulting in the issuance of the abovementioned order of protection. [Johnston] has a good faith basis and had reasonable cause to have plaintiff arrested on February 17, 2017" (Doc. 2 at 2) (second affirmative defense).

In August 2019, Johnston moved, pursuant to CPLR 3101(a), to exclude Rossi from her deposition on the grounds that his presence would exacerbate her post-traumatic stress disorder ("PTSD") (motion sequence 004) (Doc. 75). Rossi opposed the motion and cross-moved for an order requesting that this Court so-order a subpoena seeking disclosure of all records relating to Johnston's diagnosis and treatment on the grounds that the physician-client privilege had been waived (Doc. 75). Johnston's motion was granted, and Rossi's cross motion was denied (Doc. 75).

In December 2019, Johnston filed the instant motion seeking to amend her answer to include the aforementioned counterclaims (Doc. 79). In her proposed amended answer, Johnston asserts a counterclaim for IIED (first counterclaim) based on allegations that, since February 16, 2017 and continuing through the present, Rossi has engaged in a campaign of threatening and harassing conduct towards Johnston, both verbal and physical (Doc. 81 ¶ 14-35). This cause of

action is premised predominantly on allegations that, on February 16, 2017, Rossi approached Johnston in violation of the 2015 order of protection and mouthed "arrest me" (Doc. 81 ¶ 23); that he approached her again on February 17, 2017, exhibiting violent physical conduct which placed Johnston in imminent fear of her personal safety (Doc. 81 ¶ 24); and that Rossi told the parties' children in April and June 2018 to prepare for Johnston's disappearance, knowing that said comments would be revealed to Johnston (Doc. 81 ¶ 25-31). This conduct, claims Johnston, resulted in her ongoing emotional distress (Doc. 81 ¶ 32-33).

In her counterclaim for prima facie tort (second counterclaim), Johnston alleges, *inter alia*, that the conduct was undertaken with no justification and with the sole purpose of harming her; that the speech that Rossi allegedly engaged in was, under the circumstances, patently unlawful; and that Rossi harmed her emotionally, physically and financially (Doc. 81 ¶ 36-42).

Johnston also asserts a counterclaim (third counterclaim) for abuse of process based on allegations that, *inter alia*, Rossi's ulterior motive in commencing this action is not to vindicate the interests alleged in the complaint but, rather, to "silence [her] from communicating with authorities in connection with certain aspects of [Rossi's] personal and business life" and to gain a collateral advantage in an ongoing child custody dispute that is pending in California (Doc. 81 ¶ 43-51).

Johnston maintains that the proposed counterclaims "[n]ot only . . . derive from the same nexus of facts predicating [Rossi's] action, but in her original answer, [Johnston] provided [Rossi] with notice of the circumstances underlying the proposed amendments by asserting in her second affirmative defense that [p]laintiff has a history of both mental and physical abuse of defendant resulting in issuance of the [order of protection]" [internal quotation marks and brackets omitted] (Doc. 80 ¶ 11). Moreover, Johnston argues that the proposed counterclaims relate back to the date of the initial answer pursuant to CPLR 203(d) and 203(f) (Doc. 80 ¶ 25).

In opposition to the motion, Rossi argues, *inter alia*, that the proposed counterclaims, which are intentional torts, are time-barred by the one-year statute of limitations pursuant to CPLR 215(3) (Doc. 89 at 3-6). Rossi further represents that the relation-back doctrine as codified in CPLR 203(f) is inapplicable because Johnston's original pleadings fail to give plaintiff notice of the transactions or occurrences to be proved by the amended complaint, given that, *inter alia*, "[she] seeks to add claims based on occurrences that not only were not alleged in the earlier pleadings, but that could not possibly have been contemplated when that pleading was interposed because they had not yet (allegedly) happened" (Doc. 89 at 4-6). Rossi argues that the restraining order referenced in Johnston's second affirmative defense was issued on April 30, 2015 and, thus, that the only transactions and occurrences that are arguably referenced in the second affirmative defense were already outside the limitations period at the time that Johnston's original answer was filed in June 2017 (Doc. 89 at 5). Insofar as Johnston references alleged conduct from April and June 2018, Rossi contends that the original pleading could not have apprised him of the conduct which is the subject of Johnston's proposed answer (Doc. 89 at 4-5).

Further, Rossi asserts that Johnston's reliance on CPLR 203(d) is misplaced because "[i]n relying on that subsection, Johnston implies (without any reasoned consideration) that the notice requirement imposed by [CPLR 203(f)], which expressly applies to amended pleadings, is negated by [CPLR 203 (d)], which contains no reference to amended pleadings" (Doc. 89 at 6). Such interpretation, claims Rossi, would render the requirements set forth in CPLR 203(f) superfluous, and it denotes Johnston's attempt to circumvent the relation-back doctrine (Doc. 89 at 6). Additionally, Rossi contends that the proposed counterclaims are manifestly insufficient and that, alternatively, the motion should be denied on those grounds (Doc. 89 at 7-10).

In her reply papers, Johnston argues, *inter alia*, that, contrary to Rossi's contention, the proposed counterclaims are not time-barred, are sufficiently pleaded, and that the proposed amendments will cause Rossi no prejudice (Doc. 91 at 2). Specifically, Johnston claims that the prima facie tort claim seeks both economic and non-economic damages and, thus, that "[b]ecause the statute of limitations governing the abuse of process claim has not expired, it necessarily follows that the limitation period applicable to so much of the prima facie tort claim as is premised on economic damages arising from said abuse of process, will not expire until one-year after this action has concluded" (Doc. 91 at 3).

Moreover, she claims that the IIED claim, as well as that branch of the prima facie tort claim seeking damages for emotional injuries is timely by operation of CPLR 203(d) and (f) (Doc. 91 at 4). Johnston maintains that, since the second affirmative defense in the original answer apprised Rossi that his history and pattern of physical and emotional abuse leading up to and including February 17, 2017 could be called into question, Rossi had notice of her counterclaims for IIED and prima facie tort (Doc. 91 at 6-7). Alternatively, Johnston asserts that the continuing tort doctrine applies under these circumstances to allow her to seek relief for abusive conduct beyond the one-year statute of limitations, "as said conduct was tolled until no earlier than February 17, 2017, and would be within the statute of limitations when the original answer was interposed" (emphasis omitted) (Doc. 91 at 7-8).

In response to Rossi's claims that the counterclaims are insufficiently pleaded, Johnston argues that a claim for prima facie tort falls outside the ambit of CPLR 3016 and need not be pleaded with particularity (Doc. 91 at 12-13). Even if a heightened pleading is required, Johnston maintains that the counterclaim nevertheless meets this standard because she specifies that her damages are based on expenditures for medical and legal bills (Doc. 91 at 13-14). She also asserts

that, contrary to Rossi's argument, the abuse of process claim not only relies on the commencement of a legal action but, additionally, on Rossi's protracted litigation, including the use of a subpoena to obtain Johnston's medical records, and his attempt to gain an advantage in the child custody proceeding (Doc. 91 at 14-15). Lastly, Johnston argues that there is a viable IIED counterclaim because allegations that Rossi engaged in a campaign of verbal and emotional abuse, that he violated the protective order, and that he abused the system to gain a collateral advantage in the child custody proceedings were pleaded (Doc. 91 at 16-18).

With the Court's permission, Rossi submitted a sur-reply addressing arguments in Johnston's reply memorandum of law regarding the abuse of process counterclaim (Doc. 96). Rossi contends therein that a request for a judicial authorization of a subpoena cannot constitute an abuse of process (Doc. 96 at 2-4). He urges this Court to reject Johnston's allegations that Rossi's attempt to subpoena privileged medical records in this action support her abuse of process counterclaim (Doc. 96 at 2). Rossi argues that Johnston misconstrues the nature of an abuse of process claim insofar as "[t]he one and only action by Rossi she identifies – an action that went no further than unsuccessfully *seeking* the issuance of a subpoena – did not entail 'use' of process at all, much less 'improper' use" (Doc. 96 at 3).

In a sur sur-reply (Doc. 97), Johnston argues, *inter alia*, that Rossi fails to appreciate her allegations that Rossi's subpoena in this action is also connected to his continued efforts to exhaust her financial resources and gain an upper-hand in an ongoing child custody dispute (Doc. 97 at 5). She claims that, at the very least, these allegations state a cause of action for abuse of process requiring discovery (Doc. 97 at 5).

LEGAL CONCLUSIONS:

It is well-settled that "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties" (CPLR 3025[b]) and that "[l]eave to amend the pleading shall be freely given absent prejudice or surprise resulting directly from the delay" (*Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420, 420 [1st Dept 2014] [internal quotation marks and citations omitted]; *see Davis v Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept 2001]). "On a motion for leave to amend a pleading, movant need not establish the merit of the proposed new allegations, but must 'simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit'" (*Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012], *quoting MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; *see Bishop v Maurer*, 83 AD3d 483, 485 [1st Dept 2011]).

The relation-back doctrine, which is codified in CPLR 203(f), provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading" (*see Lang-Salgado v Mount Sinai Med. Ctr., Inc.,* 157 AD3d 532, 533 [1st Dept 2018]; *Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 547 [1st Dept 2013]). "The doctrine is aimed at liberalizing the strict, formalistic pleading requirements of the nineteenth century, while at the same time respecting the important policies inherent in statutory repose, and enables a plaintiff to correct a pleading error — by adding either a new claim or a new party — after the statutory limitations period has expired" (*O'Halloran v Metropolitan Transp. Authority*, 154 AD3d 83, 86 [1st Dept 2017] [internal quotation marks, brackets and ellipses omitted]; *see*

Buran v Coupal, 87 NY2d 173, 177 [1995]). A court may exercise its "sound judicial discretion to identify cases that justify relaxation of limitations strictures to facilitate decisions on the merits if the correction will not cause undue prejudice to the [movant's] adversary" (*Buran v Coupal*, 87 NY2d at 177-178 [internal quotation marks, ellipsis and citation omitted]).

Moreover, CPLR 203(d) provides, in pertinent part, that "[a] defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed."

Abuse of Process (third counterclaim)

This Court rejects Rossi's contention that Johnston's abuse of process counterclaim is barred by the statute of limitations. "A one-year statute of limitations . . . governs a cause of action for abuse of process" (*10 Ellicott Sq. Ct. Corp. v Violet Realty, Inc.*, 81 AD3d 1366, 1368-1369 [4th Dept 2011], *lv denied* 17 NY3d 704 [2011]; *see Benyo v Sikorjak*, 50 AD3d 1074, 1077 [2d Dept 2008]). And, while the Court of Appeals has expressly held that "accrual of a cause of action for abuse of process need not await the termination of an action in claimant's favor" (*Cunningham v State,* 53 NY2d 851, 853 [1981]),[1] "it is far from clear [whether], under New York law, the one-

[1] The Appellate Division, Third Department, has limited the holding in *Cunningham* to claims arising under the Court of Claims Act (*see Dobies v Brefka*, 263 AD2d 721, 723 [3d Dept 1999] ("[w]hile the Court of Appeals has held that in an action under Court of Claims Act § 10, accrual of a cause of action for abuse of process need not await the termination of an action in claimant's favor, here the abuse of process would not have been actionable until the proceeding was concluded since plaintiff would not have been able to allege that he suffered an injury without

year statute of limitations governing a cause of action for abuse of process begins to run upon termination of the underlying proceeding, as opposed to initiation of that proceeding" (*Douglas v New York State Adirondack Park Agency*, 2012 WL 5364344, *7 [NDNY 2012]; *see Hillary v St. Lawrence County*, 2019 WL 977876, *17 [SDNY 2019]; *Beninati v Nicotra*, 239 AD2d 242, 242 [1st Dept 1997]; *Henriques v Linville*, 30 Misc 3d 1215[A], 7 [Sup Ct, NY County 2011]). Johnston points to authority to support her position that her counterclaim for abuse of process will not begin to accrue until she is "entitled to maintain the action, i.e. when there is a determination favorable to plaintiffs, notwithstanding the pendency of an appeal" (*10 Ellicott Sq. Ct. Corp. v Violet Realty, Inc.,* 81 AD3d at 1369 [internal quotation marks, brackets and citations omitted]). Moreover, this Court is persuaded that "an abuse-of-process claim may be ripe upon the issuance of the process in question, but that the accrual date (for purposes of a statute of limitations) as a matter of policy is effectively tolled until the termination of the proceeding in which the process was issued" (*Douglas v New York State Adirondack Park Agency*, 2012 WL 5364344, *7 [NDNY 2012]).

This Court nevertheless denies that branch of Johnston's motion seeking to add a counterclaim for abuse of process. The elements of abuse of process are (1) regularly issued process (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (*see Casa de Meadows Inc. [Cayman Islands] v Zaman*, 76 AD3d 917, 921 [1st Dept 2010]). It is well-established that mere commencement of an action is insufficient to sustain a claim for abuse of process (*see Batbrothers LLC v Paushok*, 172 AD3d 529, 530 [1st Dept 2019]; *Casa de Meadows Inc. [Cayman Islands] v Zaman*, 76 AD3d

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justification until the proceeding was terminated ....") (internal quotation marks and citation omitted).

at 921). Although Johnston argues that there is a viable abuse of process claim based on Rossi's attempt to subpoena her medical records in this action, which she asserts was done to gain an unfair advantage in the pending child custody proceeding (Doc. 81 ¶ 17), no such allegation is pleaded in the counterclaim (*compare Ginsberg v Ginsberg*, 84 AD2d 573, 573-574 [2d Dept 1981]). Thus, that branch of Johnston's motion seeking to add a counterclaim for abuse of process is denied for failure to state a claim.

Prima Facie Tort Claim (second counterclaim)

That branch of Johnston's motion seeking to add a counterclaim for prima facie tort is also denied because Johnston fails to plead the element of special damages with particularity. "The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v. Hearst Corp.*, 65 NY2d 135, 142-143 [1985] [citations omitted]). However, it is well-settled that, "[a]n essential element of such a cause of action is an allegation of special damages, fully and accurately stated with sufficient particularity as to identify and causally relate the actual losses to the allegedly tortious acts. Failure to do so lays the cause of action open to summary dismissal" (*Broadway & 67th St. Corp v New York*, 100 AD2d 478, 486-487 [1st Dept 1984]; *see Dembitzer v Chera*, 305 AD2d 531, 533 [2d Dept 2003]; *Tooker v Whitworth*, 2018 NY Slip Op 30658[U], 2018 Misc LEXIS 1344, *14 [Sup Ct, NY County 2018]).

In her proposed counterclaim for prima facie tort, Johnston alleges that Rossi's conduct damaged her "in an amount to be determined by the trier of fact that exceeds the jurisdictional limit of all inferior trial courts of the State of New York" (Doc. 81 ¶ 42). While it does incorporate

by reference an allegation contained in the IIED claim that Rossi's conduct "resulted in special damages, which took and continue to take the form of ongoing medical bills and legal bills, all of which are specifically quantifiable" (Doc. 81 ¶ 34), this conclusory assertion is insufficient to meet the pleading requirement for a prima facie tort claim (*see generally Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]).

Intentional Infliction of Emotional Distress (first counterclaim)

Although it is unclear how the second affirmative defense in the June 2017 answer gave Rossi notice of events occurring *after* the filing of the pleading (i.e. Rossi's comment to the parties' children in April and June 2018), this Court nevertheless finds that allegations regarding Rossi's history of mental and physical abuse against Johnston, preceding the 2015 order of protection up to February 17, 2017, was sufficient to provide him with notice of the IIED counterclaim now asserted. Johnston's IIED counterclaim relates, in large part, to the same nexus of facts alleged in the complaint, and no prejudice has been argued by Rossi. Thus, in its discretion, this Court finds that the IIED claim relates back to the original pleading (*see* CPLR 203[f]; *O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d at 87-88).

A claim for intention infliction of emotional distress requires that its proponent establish "(1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016] [internal quotation marks and citation omitted]). This standard is "rigorous, and difficult to satisfy[,]" and "[l]iability 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 v NY Post Co.*, 81 NY2d 115, 122 [1993] [internal quotation marks and citations omitted]; *see Rubin v Napoli Bern Ripka Shkolnik, LLP*, 2016 NY Slip Op 31792[U], 2016 NY Misc LEXIS 3488, * 4-5 [Sup Ct, NY County 2016]).

This Court rejects Rossi's argument that Johnston's counterclaim for IIED warrants dismissal for failure to state a cause of action. While this Court concedes that "[t]he standard of outrageous conduct is strict, rigorous and difficult to satisfy, . . . that is not the case when there is [, as alleged here,] a deliberate and malicious campaign of harassment or intimidation" (*Scollar v City of New York*, 160 AD3d 140, 146 [1st Dept 2018] [internal quotation marks and citations omitted]). Johnston's counterclaim for IIED is premised predominantly on allegations that Rossi approached her and mouthed "arrest me;" that he went to the children's school exhibiting "violent physical conduct" and that Rossi told the parties' children that they should prepare for their mother's "disappearance" (Doc. 81 ¶ 23-32). Moreover, there are additional allegations that Rossi has a pattern of physical and emotional abuse that has continued to the present, and that this action was commenced with the purpose of gaining leverage in the pending custody dispute, to harass Johnston, and to expend and deplete her financial resources (*see generally Green v Fischbein Oliveieri Rozenholc & Badillo*, 119 AD2d 345, 349-350 [1st Dept 1986]). Thus, assuming the facts as true, this Court cannot find that "the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit" (*Bishop v Maurer*, 83 AD3d at 485).

The remaining arguments are either without merit of need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby

ORDERED that defendant Kerri-Ann Johnston's motion to amend her answer is granted to the extent it seeks to add a counterclaim for intentional infliction of emotional distress (first counterclaim), and it is otherwise denied; and it is further

ORDERED that, within 30 days of service of this order, with notice of entry, defendant Kerri-Ann Johnston shall serve and file a newly drafted amended answer, as limited by the preceding paragraphs and in accordance with this order; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference scheduled for October 6, 2020, at 2:15 P.M., in Part 2, Courtroom 280, at 80 Centre Street, New York, NY; and it is further

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

6/15/2020
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE