

Wicked Entertainment, Inc. v Burbacki

2020 NY Slip Op 32375(U)

July 20, 2020

Supreme Court, New York County

Docket Number: 652352/2018

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

WIKKED ENTERTAINMENT, INC.
Plaintiff,

- v -

BURBACKI, ZARINA
Defendant.

INDEX NO. 652352/2018
MOTION DATE 01/17/2020
MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 007) 82, 83, 84, 85, 86, 87, 88, 89, 90, 94, 95, 96, 97, 98 were read on this motion to/for DISMISS

Upon the foregoing documents and for the reasons that follow, Zarina Burbacki's motion to dismiss Stella Stolper's First Amended Verified Complaint (the Amended Complaint) pursuant to CPLR §§ 3211 (a) (1), (5) and (7) and for attorneys' fees pursuant to 22 NYCRR § 130-1.1 is denied in its entirety.

I. The Facts Relevant to the Motion

According to the Amended Complaint, in January 2016, Stella Stolper hired her niece, Zarina Burbacki, an attorney licensed to practice in New York, to work for Ms. Stolper's management and production company, Wicked Entertainment, Inc. (Wicked) as its in-house counsel and Chief of Staff (Am. Compl., ¶¶ 2-8). Ms. Stolper also helped Ms. Burbacki's husband, Yonatan Shimrony, get a job in the entertainment industry (id., ¶ 10). However, within a few months after Ms. Burbacki began working for Ms. Stolper at Wicked, Ms. Burbacki and Mr. Shimrony created their own, competing companies called YoZa Consulting LLC (YoZa) and 345

Consulting LLC (**345 Consulting**), for the purpose of poaching Wikked's clients and diverting business opportunities for their own benefit (*id.*, ¶¶ 13-15).

Ms. Stolper also alleges that Ms. Burbacki was employed as Ms. Stolper and Wikked's lawyer but failed to provide a written retainer as required under New York law (*id.*, ¶ 22). She alleges that Ms. Burbacki advised Ms. Stolper against certain business opportunities in bad faith to further her own interests (*id.*, ¶ 17). In one particular incident, Ms. Stolper alleges that Ms. Burbacki failed to make the necessary efforts to obtain certain patents and trademarks needed to launch a skin care product line that Ms. Stolper was working on and, as a result, the product line never launched (*id.*, ¶¶ 17-21).

Ms. Stolper also details allegations concerning Ms. Burbacki's attempts to wrest control of Ms. Stolper and Wikked's finances from Ms. Stolper. In one example, she alleges that, acting as Ms. Stolper's personal attorney, Ms. Burbacki advised Ms. Stolper to set up two trusts in California to safeguard her assets (*id.*, ¶ 23). Ms. Burbacki then allegedly set up the trusts and named herself and Mr. Shimrony as the trustees in a scheme designed to give them complete control over Ms. Stolper's assets (*id.*). Ms. Stolper asserts that Ms. Burbacki, who was not licensed to practice law in California and had no knowledge of California law, misrepresented the need for the trusts and the benefits of structuring them in such a way as to give Ms. Burbacki and Mr. Shimrony complete control (*id.*). In another example, Ms. Stolper alleges that Ms. Burbacki convinced Ms. Stolper to put her funds in an attorney escrow account, but after a few months, she stopped providing a formal accounting and withheld \$125,000, which Ms. Stolper claims Ms. Burbacki kept for herself (*id.*, ¶¶ 31-37). When Ms. Stolper requested that all of the funds in

the escrow account be returned to her bank account, Ms. Burbacki allegedly transferred \$350,000 into the bank account, but withheld an additional \$150,000, which she claimed was a gift to Ms. Burbacki and Mr. Shimrony from Mr. Shimrony's father (*id.*, ¶ 38).

Ms. Stolper also alleges that Ms. Burbacki made disparaging comments about Ms. Stolper to her sole talent management client, Mariah Carey, and to others in the entertainment industry (*id.*, ¶ 40).

She alleges, for example, that on August 29, 2017, Ms. Burbacki made false and defamatory statements to people in the entertainment industry in Denver, Colorado, including that Ms. Stolper was stealing from Ms. Carey by structuring deals to take a bigger cut of the revenue for herself, charging fraudulent agent's commissions, and hiding \$5 million in stolen funds in a secret bank account (*id.*, ¶ 41). On October 14, 2017, in what Ms. Stolper describes as a "clandestine meeting" with Ms. Carey at Foxwoods Casino in Connecticut, Ms. Stolper claims that Ms. Burbacki and Mr. Shimrony repeated their statements concerning Ms. Stolper's purported self-dealing and theft and impugned her character and intentions as Ms. Carey's manager to Ms. Carey (*id.*, ¶ 42). Ms. Stolper further asserts that at that same meeting at Foxwoods Casino, Ms. Burbacki and Mr. Shimrony shared a damaging but misleading telephone conversation between Ms. Burbacki and Ms. Stolper with Ms. Carey, which Ms. Stolper claims was illegally recorded (*id.*, ¶ 43).

The Amended Complaint describes other misconduct, including accessing Ms. Stolper's email account without authorization to gain information that they used to further their own interests,

and communicating with Ms. Stolper's business contacts in an attempt to gain confidential information about possible deals (*id.*, ¶¶ 26-30, 45). Ms. Stolper references a specific event in which she was informed by a contact at Sony Pictures that Ms. Burbacki had attempted to communicate with the studio to usurp Ms. Burbacki's business opportunities and had intentionally excluded Ms. Stolper from the communications (*id.*, ¶ 45). Ultimately, Ms. Stolper claims that her sole talent management client and other third parties terminated their contracts with her as a result of Ms. Burbacki's actions (*id.*, ¶ 46).

Wikked and Ms. Stolper filed a summons and complaint (the **Original Complaint**) against Ms. Burbacki and Mr. Shimrony (NYSCEF Doc. No. 1). Ms. Burbacki and Mr. Shimrony moved to dismiss the Original Complaint pursuant to CPLR §§ 3211 (a) (1) and (7) (Mtn. Seq. No. 001). The court granted the motion in part and dismissed the second (tortious interference with prospective economic advantage), fourth (breach of fiduciary duty), fifth (unjust enrichment), sixth (defamation), seventh (violation of 18 USC § 270), eighth (Cal. Penal Code § 630), and ninth (invasion of privacy) causes of action, and dismissed the Original Complaint in its entirety as against Mr. Shimrony (NYSCEF Doc. No. 26, 1-3). The court also dismissed the Original Complaint as it related to Wikked, as none of the allegations related to Wikked (*id.* at 3). As relevant here, the court dismissed the defamation cause of action without prejudice, holding that there were insufficient factual allegations in the Original Complaint to meet the heightened pleading standard under CPLR § 3016 (*id.* at 2). The court explained that, "among other deficiencies, no one is specifically identified as having heard or been affected by the alleged defamatory statement" (*id.*).

Ms. Stolper subsequently filed the Amended Complaint against Ms. Burbacki, this time asserting causes of action for conversion, breach of fiduciary duty, defamation, accounting, and legal malpractice (NYSCEF Doc. No. 87). Ms. Burbacki has moved to dismiss the Amended Complaint, arguing, among other things, that Ms. Stolper's claims are barred by a certain Settlement Agreement and Mutual Release (the **Mutual Release**), by and between Ms. Stolper and Ms. Carey, relating to a lawsuit filed by Ms. Stolper in the New York State Supreme Court, New York County, in the matter captioned *Stella Stolper, et al. v Mariah Carey*, Index No. 651806/2018 (NYSCEF Doc. No. 88).

II. Discussion

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

In support of the motion to dismiss, Ms. Burbacki argues that (1) all of the causes of action asserted in the Amended Complaint are barred by the Mutual Release, (2) a certain email from Ms. Stolper utterly refutes that allegations in the first (conversion), second (breach of fiduciary duty), fourth (accounting), and fifth (legal malpractice) causes of action, (3) the allegations made by Ms. Stolper in a separate action filed in California directly contradict and disprove the allegations in the third cause of action (defamation), and (4) the allegations in support of the third (defamation) and fifth (legal malpractice) causes of action are vague and conclusory.

In her opposition papers, Ms. Stolper argues that (1) the Mutual Release does not apply to Ms. Burbacki, (2) the email relied on by Ms. Burbacki does not conclusively establish a defense to any of the causes of action in the Amended Complaint as a matter of law, (3) the complaint in the California action does not contradict but rather supports the defamation claim in this action, and (4) the defamation and legal malpractice causes of action are alleged with sufficient specificity to survive a motion to dismiss.

First, the Mutual Release does not bar Ms. Stolper's claims in this action because she never released her own attorney, Ms. Burbacki, pursuant to such Mutual Release. Section 4 of the Mutual Release provides:

(a) Except for the obligations created by this Agreement, . . . the Parties, each for themselves, and for all their respective corporations, limited liability companies, partnerships, subsidiaries, officers, predecessors, successors in interest, assigns, heirs, executors, agents, representatives, consultants, family members, insurers, reinsurers, lawyers, and all others who may take any interest in the matters herein released (the "Stolper Releasees" and the "Carey Releasees," collectively as the "Releasees"), hereby fully and forever release, acquit, and discharge *each other and each other's* . . . assigns, heirs, executors, agents, representatives (including, without limitation, Roc Nation, LLC, and its employees), family members, insurers, reinsurers, *lawyers* and all others who may take any interest in the matters herein

except as provided below, from any and all claims, demands, damages, losses, rights and causes of action, known or unknown, that each may have against the other from the beginning of time to the date of this Agreement (the “Claims”). This release shall be a fully binding and complete settlement between and among the Parties and the Releasees. The Parties expressly waive and assume the risk of any and all claims for damages which exist as of this date, but of which the Parties do not know or suspect to exist, whether through ignorance, oversight, error, negligence, or otherwise, and which, if known, would materially affect the Parties’ decisions to enter into this Agreement. The Parties assume the risk that the facts or law may be other than what they believe.

(*id.* [emphasis added]).

Ms. Burbacki’s argument fails because although Ms. Stolper and Ms. Carey released each other and each other’s lawyers (NYSCEF Doc. No. 88, § 4 [emphasis added]), they did not release claims against *their own* lawyers. The plain meaning of the language of the Mutual Release is that there was no release as to any claims that each party might have against its own lawyers (*Elias v Gettry Marcus CPA, P.C.*, 2018 WL 3117510 at *4 [SD NY, June 25, 2018, 17 Civ. 4066 (ER)] [“The most natural reading of this language is that the parties intended to release each other and those individuals acting as the counterparties’ agents, not that the parties intended to release claims against their own agents.”]). Put another way, Ms. Stolper released any and all claims against Ms. Carey and Ms. Carey’s lawyers, and Ms. Carey released any and all claims against Ms. Stolper and Ms. Stolper’s lawyers, but they did not release any claims that either of them may have as against their own lawyers. For the avoidance, to the extent that Ms. Burbacki argues that there is no carve-out of her from the release, it is of no moment because, for the reasons set forth above, Mr. Stolper’s release language does not cover her or any of her own employees in the first instance. In other words, the absence of a carve-out does not expand the

language of the release itself. Accordingly, the Mutual Release is not a bar to Ms. Stolper's claims in this action.

Second, the email, dated October 27, 2017, sent from Ms. Stolper to Ms. Carey (NYSCEF Doc. No. 89) does not utterly refute the allegations in the Amended Complaint that Ms. Burbacki was employed as Ms. Stolper and Wikked's attorney or conclusively establish a defense as a matter of law. On the contrary, the gravamen of the October 2017 Email suggests Ms. Stolper's frustration and a gratuitous attempt at demeaning Ms. Burbacki, who was hired as more than an assistant:

SO IF ANYONE THINKS THAT ZARINA who is basically a glorified assistant with ZERO relationships in our business or any business for that matter, OR ANYONE ELSE IS GOING TO STEP IN AND TRY TO UNDERMINE ME, LIE ABOUT ME DISCREDIT ME IN AN EFFORT TO STEAL ALL OF THE ABOVE, MUST BE OUT OF THEIR . . . MINDS !!

In any event, this does not provide a sufficient basis to utterly refute the allegation and warrant dismissal.

Third, the cross-complaint filed by Ms. Stolper against Lianna Shakhazaryan in the California action (the **Cross-Complaint**) also fails to conclusively establish a defense to the defamation claim as a matter of law. In the Cross-Complaint, Ms. Stolper alleges that Ms. Shakhazaryan attended the October 14, 2017 meeting at Foxwoods Casino with Ms. Burbacki and Mr. Shimrony and that they relayed false accusations of physical and sexual abuse by Ms. Stolper to Ms. Carey (NYSCEF Doc. No. 90, ¶ 19). This allegation is entirely consistent with the version of events described in the Amended Complaint in this action and does not, as Ms. Burbacki argues, conclusively establish that it was Ms. Shakhazaryan and not Ms. Burbacki who made

defamatory statements at the meeting at Foxwoods Casino. In addition, and significantly, the allegations concerning the statements made at this meeting relate to only one of multiple instances described in the Amended Complaint.

To the extent that Ms. Burbacki argues that the third cause of action for defamation must be dismissed because it is not pleaded with sufficient detail, the argument is unavailing. The elements of 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” (*Dillon v City of New York*, 261 AD2d 34, 37-38 [1st Dept 1999]). Defamation must be pleaded with particularity pursuant to CPLR 3016 (b). To satisfy the heightened pleading standard, the plaintiff must allege with specificity “the time, place and manner of the false statement and . . . to whom it was made” (*Dillon*, 261 AD2d at 38).

Here, as discussed above, the court previously dismissed this claim on the ground that it was not pleaded with sufficient particularity as required under CPLR § 3016. In the Amended Complaint, Ms. Stolper describes three separate incidents in which Ms. Burbacki made allegedly defamatory statements to third parties that were injurious to Ms. Stolper’s business or profession in sufficient detail to sustain a cause of action for defamation at this stage in the proceedings. The Amended Complaint sets forth the time, place, and manner of the allegedly defamatory statements, and for one incident, identifies the specific individual to whom the statements were allegedly made (i.e., Ms. Carey). Although with respect to the other two incidents Ms. Stolper does not identify the specific third parties to whom the defamatory statements were allegedly

made by name, the allegations in the Amended Complaint are sufficient to provide “both the court and the defendants adequate notice of the various transactions and occurrences by which plaintiff intends to prove that the remarks made by the defendants are attributable to those parties” (*Herlihu v Metro. Museum of Art*, 214 AD2d 250, 260 [1st Dept 1995]). Accordingly, the motion to dismiss the third cause of action is denied.

Additionally, the motion to dismiss is denied as it relates to the fourth cause of action for legal malpractice. To state a cause of action for legal malpractice, “a plaintiff must demonstrate that the attorney ‘failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession’ and that the attorney’s breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages” (*Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 [2007], quoting (*McCoy v Feinman*, 99 NY2d 295, 301–302 [2002] [internal quotation marks and citation omitted])).

Here, Ms. Stolper alleges that “[i]n the course of their employment as Ms. Stolper’s and Wikked’s attorneys, Burbacki consistently committed malpractice by either negligently and improperly performing legal tasks or by negligently failing to perform necessary and required legal tasks” (Am. Compl. ¶ 70). Specifically, Ms. Stolper alleges that (i) Ms. Burbacki intentionally misrepresented her legal knowledge and experience (*id.*, ¶ 16), (ii) Ms. Burbacki represented that she was working on securing certain patents and trademarks that were necessary in connection with a skin care product line that Ms. Stolper planned to launch, but that she failed to take the necessary actions to obtain them and, as a result, the product line never launched (*id.*, ¶¶ 18-21), (iii) Ms. Burbacki served as Ms. Stolper’s personal lawyer but failed to provide her

with a written retainer letter as required under New York law (*id.*, ¶ 22), (iv) Ms. Burbacki misrepresented her knowledge and understanding of California law and lacked the legal acumen to perform the services that she was entrusted to perform, including advising Ms. Stolper on the benefits of setting up trusts in California and giving total control to Ms. Burbacki and Mr. Shimonry, and (v) Ms. Burbacki mismanaged the attorney escrow account by comingling and then converting Ms. Stolper's funds (*id.*, ¶¶ 33-35). Taking these allegations as true and according them the benefit of every favorable inference, Ms. Stolper has sufficiently stated a cause of action for legal malpractice. Therefore, the motion to dismiss is denied as it relates to the fourth cause of action.

Finally, Ms. Burbacki's application for attorneys' fees pursuant to 22 NYCRR § 130-1.1 is denied as Ms. Stolper's claims are not frivolous.

Accordingly, it is

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that, upon service upon him of this decision and order with notice of entry, the Clerk of the General Clerk's Office (60 Centre Street, Room 119) shall amend the caption to:

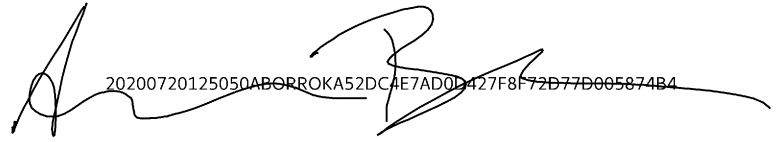
Stella Stolper,

Plaintiff,

-against-

Zarina Burbacki,

Defendant.



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7/20/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE