

Summer v Morris

2021 NY Slip Op 32732(U)

December 21, 2021

Supreme Court, New York County

Docket Number: Index No. 153711/2021

Judge: David Benjamin Cohen

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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. DAVID B. COHEN

PART 58

Justice

-----X

INDEX NO. 153711/2021

KRISTEN SUMMER,

Plaintiff,

MOTION SEQ. NO. 002

- v -

DARIUS AARON MORRIS,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16
were read on this motion to/for DISMISSAL.

In this tort action commenced by plaintiff Kristen Summer against defendant Darius Aaron Morris plaintiff moves, pursuant to CPLR 3211(a)(7), to dismiss defendant's counterclaims. Defendant opposes the motion. After consideration of the parties' contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff alleged in her complaint that, as a result of being beaten by defendant, she sustained physical and mental suffering. Doc. 9. Defendant thereafter answered the complaint, denying all allegations of wrongdoing and counterclaiming against plaintiff for intentional infliction of emotional distress ("IIED") (first counterclaim), negligent infliction of emotional distress ("NIED") (second counterclaim), defamation (third counterclaim), and tortious interference with contract (fourth counterclaim). Doc. 10.

Plaintiff now moves, pursuant to CPLR 3211(a)(7), to dismiss defendant's counterclaims on the ground that they fail to state a cause of action. Docs. 14-15. Specifically, plaintiff argues that the counterclaim for IIED must be dismissed as conclusory because defendant has not

pleaded what particular conduct gave rise to the claim. Doc. 15. Plaintiff also alleges that defendant's counterclaim for NIED must be dismissed since it is conclusory and defendant has not pleaded that plaintiff's actions endangered his physical safety or made him fear for his physical safety. Doc. 15. Similarly, plaintiff claims that the counterclaim for defamation must be dismissed since it is conclusory and is improperly based on allegations in the complaint. Doc. 15. Finally, plaintiff maintains that the counterclaim for tortious interference with contract must be dismissed since it is conclusory and fails to specify any contract with which plaintiff interfered.

In opposition, defendant argues that his counterclaim for IIED is not subject to dismissal because it is not conclusory and because plaintiff engaged in extreme and outrageous conduct, including making death threats against defendant. Doc. 16. Defendant further argues that his counterclaim for NIED is not subject to dismissal since it is not conclusory and the death threats made by plaintiff put him in fear for his own safety. Doc. 16. Additionally, defendant argues that his counterclaim for defamation is not conclusory and that it specifically refers to defamatory comments made by plaintiff. Doc. 16. Finally, defendant argues that his counterclaim for tortious interference with contract is not conclusory and that he has set forth in his answer precisely how plaintiff committed the said tort. Doc. 16.

LEGAL CONCLUSIONS

CPLR 3211 (a) (7) provides that a claim and/or action may be dismissed due to a party's failure to state a cause of action. It is

well settled that on a CPLR 3211(a)(7) motion the allegations in the complaint are to be afforded liberal construction, and the facts alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable inference and determining only whether the facts alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Jericho Group, Ltd. v Midtown Dev., L.P.*, 32 AD3d 294, 298 [1st Dept 2006]). A motion to dismiss under CPLR 3211(a)(7) for failure

to state a cause of action must be denied if the factual allegations contained within the four corners of the pleading manifest any cause of action cognizable at law (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). While factual allegations set forth in a complaint should be accorded every favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*see Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]).

(*M&E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]).

IIED

To state a claim for IIED, a plaintiff must allege “(1) extreme and outrageous conduct, (2) intent to cause severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) severe emotional distress” (*Howell v New York Post, Co.*, 81 NY2d 115, 122 [1993]). Additionally, the Appellate Division, First Department has acknowledged that the few claims of IIED which it has upheld were supported by allegations “detailing a longstanding campaign of deliberate, systematic and malicious harassment of [a party]” (*Seltzer v Bayer*, 272 AD2d 263, 264-265 [1st Dept 2000]). “Whether the requisite outrageousness has been alleged is, in the first instance, an issue of law for the courts” (*Xenias v Roosevelt Hosp.*, 180 AD3d 588, 589 [1st Dept 2020] [citations omitted]).

Here, defendant has pleaded that plaintiff engaged in “extreme and outrageous conduct with the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress”, and that plaintiff’s extreme and outrageous conduct “caused and continues to cause [him] severe emotional distress including death threats to him and his family.” Doc. 10 at 2-3. However, since defendant did not allege that plaintiff’s conduct was “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”, this claim must be dismissed (*Phillips v New York Daily News*, 111 AD3d 420, 421 [1st Dept 2013]; *Sheila C. v Povich*, 11 AD3d 120, 130-131 [1st Dept 2004] [citations omitted]). Additionally, since defendant merely

claims that plaintiff engaged in such conduct “[f]or a period of time prior to this alleged incident to the present”, he fails to plead that her conduct amounted to “a longstanding campaign of deliberate, systematic and malicious harassment of [a party]” (*Seltzer*, 272 AD2d at 264-265).

NIED

"A cause of action for [NIED] . . . generally must be premised upon the breach of a duty owed to [a party] which either unreasonably endangers the [party’s] physical safety, or causes the [party] to fear for his or her own safety" (*Sheila C.*, 11 AD3d at 130). Additionally, extreme and outrageous conduct is an essential element of a cause of action alleging NIED (*see Holmes v City of New York*, 178 AD3d 496, 111 N.Y.S.3d 856 [1st Dept 2019] [citations omitted]). Additionally, as with a claim for IIED, a cause of action for NIED “must be supported by allegations of conduct by the defendants 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” (*Sheila C.*, 11 AD3d at 130-131 [citations omitted]).

Here, defendant alleges in his second counterclaim that plaintiff owed him a duty of care and breached the same by engaging in threatening and unwarranted conduct. Doc. 10 at 3. However, he does not claim that plaintiff engaged in any outrageous behavior.¹ Nor does he support the claim with allegations that plaintiff’s conduct was so outrageous and extreme that it should be regarded as atrocious and utterly intolerable in a civilized community (*Sheila C.*, 11 AD3d at 130-131 [citations omitted]). Therefore, this counterclaim is dismissed.

DEFAMATION

Since defendant has failed to identify the specific language allegedly used by plaintiff to defame him, and has failed to set forth any reason for his failure to do so, his counterclaim for

¹ In alleging this cause of action, defendant does not incorporate by reference prior allegations in the complaint, such as the death threats allegedly made by plaintiff.

defamation must be dismissed (*See* CPLR 3016; *Manas v VMS Assoc., LLC*, 53 AD3d 451, 454-455 [1st Dept 2008]).

TORTIOUS INTERFERENCE WITH CONTRACT

“A claim of tortious interference with contract requires that four elements be pleaded: (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach; and (4) damages” (*Shear Enters., LLC v Cohen*, 189 AD3d 423, 424 [1st Dept 2020] [citations omitted]). An essential element of this cause of action is that a breach of the contract would not have occurred but for the actions of the party against whom the claim is pleaded (*See Wilmington Trust Co. v Burger King Corp.*, 34 AD3d 401, 402-403 [1st Dept 2006]; *Cantor Fitzgerald Assocs., L.P. v Tradition N. Am., Inc.*, 299 AD2d 204 [1st Dept 2002] [citations omitted]). Since defendant fails to plead “but for” causation, this claim must also be dismissed.

Accordingly, it is hereby:

ORDERED that the motion by plaintiff Kristen Summer is granted, and defendant Darian Aaron Morris' counterclaims against plaintiff for intentional infliction of emotional distress (first counterclaim), negligent infliction of emotional distress (second counterclaim), defamation (third counterclaim), and tortious interference with contract (fourth counterclaim) are dismissed; and it is further

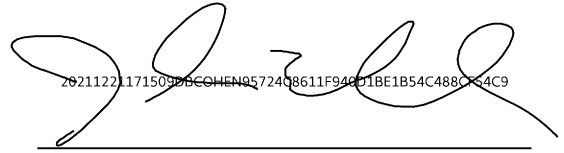
ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that, within 20 days of entry of this order, counsel for plaintiff shall serve a copy of this order, with notice of entry, upon counsel for defendant, as well as on the Clerk of the Court (Room 141B) and the General Clerk's Office (Room 119); and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further'

ORDERED that the parties are to appear for a preliminary conference in this matter via Microsoft Teams on January 25, 2022 at 12:00 noon.

12/21/2021
DATE



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DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: