

Murphy v Kozlowska
2022 NY Slip Op 32947(U)
September 2, 2022
Supreme Court, New York County
Docket Number: Index No. 150978/2022
Judge: Lisa S. Headley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY **PART** **28M**

Justice

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ARTHUR MURPHY, ROBERT GALPERN, LOUIS
GALPERN, EVA GALPERN, TAMARA GALPERN, AND
ANY AFFILIATED CORPORATE OR LLC ENTITIES
CONTROLLED BY THE ABOVE,

INDEX NO. 150978/2022

MOTION DATE 04/27/2022

MOTION SEQ. NO. 001

Plaintiff,

- v -

MONIKA KOZLOWSKA, GARY CERTAIN, ZACHARY
WEISBERG, DOUGLAS HERRING, CERTAIN & ZILBERG,
PLLC, MICHAEL A. ZILBERG, PATRICK GRIESBACH,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for DISMISSAL.

On April 7, 2022, defendants, Monika Kozłowska, Gary Certain, Michael A. Zilberg, Patrick Griesbach, Zachary Weisberh, Douglas Herring, and Certain & Zilberg, PLLC (“defendants”), filed this motion for the Court to issue an Order dismissing the action for the following reasons: 1) pursuant to *CPLR* §3211 (a)(7), for plaintiff’s failure to state a claim as required under *CPLR* §3013; 2) pursuant to *CPLR* §§3211 (a)(2) & (a)(3), for plaintiff’s lack of standing and capacity to sue; 3) because plaintiff Arthur Murphy, a non-attorney, is attempting to represent the other named plaintiffs as their counsel in this action and is engaging in the unauthorized practice of law; 4) to dismiss all causes against co-defendants, Michael A. Zilberg, Patrick Griesbach, Zachary Weisberg and Douglas Herring, since these individual defendants did not commit any of the acts alleged in the complaint, and were merely sued because they were/are associated with defendant, Certain & Zilberg, PLLC; 5) pursuant to *CPLR* §3211(a)(7), to dismiss the First, Second, Third, and Fourth causes of action because New York State does not recognize a civil cause of action for extortion as a matter of law; 6) pursuant to *CPLR* §3211(a)(7), to dismiss the Fifth cause of action because the complaint fails to satisfy the “*in haek verba*” (“*or in these words*”) pleading requirement under *CPLR* §3016(a); 7) pursuant to *CPLR* §3211(a)(7), to dismiss the Sixth cause of action for plaintiff’s failure to state a cause of action; 8) pursuant to *CPLR* §§3211(a)(2) & (a)(3), to dismiss the Seventh cause of action because plaintiff lacks standing and capacity to sue and capacity to ask that this Court declare that any defendant has violated a criminal law or the Rules of Professional Responsibility, and this Court lacks jurisdiction to render such a declaration; 9) pursuant to *CPLR* §3211(a)(7), to dismiss the Eighth cause of action because New York does not recognize an independent cause of action for punitive damages; 10) pursuant to *CPLR* §3211(a)(7), to dismiss the First, Second, Third, Fourth and Fifth causes of action because there are no allegations that defendants’ conduct “evinces a high degree of moral turpitude and demonstrate such wanton dishonesty to imply a criminal

indifference to civil obligations”; 11) to sanction plaintiff Arthur Murphy under *NYCRR 130-1.1* in the amount of \$10,000.00 plus the amount of defendants’ attorney’s fees spent in defending this frivolous action; 12) to preclude plaintiff Arthur Murphy, a non-attorney, from representing the plaintiffs in this action; and, 13) to grant such other relief the Court finds just and proper.

On April 22, 2022, plaintiff Arthur Murphy (hereinafter, “plaintiff”) filed an affidavit in opposition to defendants’ motion. On April 26, 2022, defendants filed a reply.

I. Background

On February 2, 2022, the plaintiff filed this action against defendants for alleged illegal acts committed by defendants, including conversion, trespass to chattel, defamation, libel, slander, extortion by attorneys, fraud and deceit, theft, coercion, extortion, blackmail, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages. In the complaint, plaintiff alleges, *inter alia*, that defendant Gary Certain told plaintiff that if the case was not settled quick, “it will not look good for him” and “to lay out \$750,000 if [plaintiff] didn’t want any problems.” Plaintiff alleges that such interaction is considered blackmail and extortion. Plaintiff contends that this interaction caused emotional distress to plaintiff. Further, plaintiff alleges that defendant Kozłowska is in possession of electronic devices belonging to plaintiff that Kozłowska is using, along with her co-defendants, in order to blackmail and extort plaintiff. Plaintiff alleges that defendant Kozłowska has been saying “untrue things” about plaintiff to third parties, causing damage to plaintiff’s reputation.

II. Defendants’ Motion to Dismiss the Complaint

In support of the motion to dismiss, the defendants argue, *inter alia*, that plaintiff’s complaint fails to meet the pleading requirements pursuant *CPLR §3013* because none of the statements alleged is “sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action.” Defendants argue that the plaintiff’s complaint includes bare and conclusory allegations, and does not identify the time period of when any of the items complained of allegedly occurred. The defendants contend that plaintiff Arthur Murphy purports to be the assignor of unspecified claims of “Robert Galpern, Louis Galpern, Eva Galpern, Tamara Galpern, and any affiliated corporate or LLC entities controlled by the above,” and operates a collection business and adjustment of claims where he takes assignment of the claims of others in exchange for a portion of the proceeds from the litigations that he institutes. Defendants argue that plaintiff had no pre-existing relationship with any of the purported assignors in this action or any pre-existing interest in the claims in this action before the assignment, and therefore, the complaint should be dismissed.

Further, defendants argue that co-defendants, Michael A. Zilberg, Patrick Griersbach, Zachary Weisberg, and Douglas Herring, should be dismissed from the action as the complaint does not state that any of these defendants personally committed any tort or breach of contract and they never had contact with plaintiff or the alleged assignors of the claims. Defendants argue that the First, Second, Third and Fourth causes of action must be dismissed under *CPLR §3211(a)(7)* for they are solely seeking remedy for extortion and New York does not recognize a civil cause of action for extortion as a matter of law. *See, Minelli v. Soumayah*, 41 A.D. 3d 388 (1st Dep’t 2007). Additionally, defendants argue that the Fifth cause of action in libel or slander must be dismissed because plaintiff fails to plead the particular words complained of anywhere in the complaint. Defendants also state that the Sixth cause of action in intentional infliction of emotional distress must be dismissed because the complaint does not allege any of the elements required by the Court to establish defendants’ conduct was “so outrageous in character, and so extreme in degree, as to go

beyond all possible bounds of decency...and [was] utterly intolerable in a civilized community.” See, *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y. 3d 15, 22-23 (2008). Lastly, defendants argue the Seventh cause of action should be dismissed because this Court lacks jurisdiction to declare that any deponent is in violation of any provision of the Penal Law, and plaintiff’s request for punitive damages should be denied as New York does not recognize an independent cause of action for punitive damages See, *Randi A.J. v. Long Is. Surgi-Ctr.*, 46 A.D. 3d 74, 80 (2d Dep’t 2007). Defendants request that the Court should assess sanctions against plaintiff for filing a frivolous complaint and suggest a sanction amount of \$10,000 against plaintiff Arthur Murphy, as well as award attorney’s fees to defendants in this action.

III. Plaintiff’s Opposition

In opposition to defendants’ motion to dismiss, plaintiff argues that he is not trying to misrepresent himself as an attorney. Plaintiff submits that he is appearing pro-se as an assignee of a claim, in which he has a personal interest. Plaintiff states that he is an “individual who is financially interwoven” with assignee Robert Galpern in numerous business endeavors and partnerships. Plaintiff argues that the Champerty statute does not apply to individuals with a preexisting proprietary interest in the claims that were assigned to the assignee. Plaintiff argues that discovery did not take place yet, so he was not able to prove his claim and relationship to assignors. Further, plaintiff argues that the complaint was pled sufficiently, and cited in the complaint that “defendants reached out to plaintiff by phone and threatened ‘it will not look good for you’ unless plaintiff gave them \$750,000.00[.]” Plaintiff asserts that he does not represent strangers, but represents himself and others with whom he has partnerships. Additionally, plaintiff argues that the lawsuit should not be dismissed against some of the defendant attorneys because they were part of the same company and team, and represented the same clients together. Plaintiff argues that his request for punitive damages should not be dismissed because defendants’ conduct of blackmailing defendant falls below the acceptable standard and was unreasonable. Lastly, plaintiff argues that sanctions should not be assessed against him but against defendants because they harassed and blackmailed him. Plaintiff requests this Court to deny defendants’ motion to dismiss in its entirety.

In reply, defendants assert that plaintiff still did not give the court notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and the material elements of each cause of action, nor did plaintiff address any of the deficiencies in his complaint. Additionally, defendants state plaintiff’s claim of extortion is vague and does not state a legally cognizable cause of action.

IV. Discussion

Defendants’ motion to dismiss must be granted in its entirety as plaintiff has failed to state a cause of action for conversion, trespass to chattel, defamation, libel, slander, extortion by attorneys, fraud and deceit, theft, coercion, extortion, blackmail, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages as the complaint on its face is based on bare legal conclusions and insufficient factual evidence to fit within any cognizable legal theory.

“[W]hen deciding a motion to dismiss a complaint pursuant to *CPLR* §3211, the court is required to afford the pleading ‘a liberal construction.’ It must accept the facts alleged in the complaint as true, accord [the] plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” *New York Racing Ass’n v. Nassau Regional Off-Track Betting Corp.*, 29 Misc. 3d 539, 545 (Sup. Ct. 2010). Additionally, “when deciding a motion to dismiss made pursuant to *CPLR* §3211(a)(7), the court must determine whether the pleader has a cognizable cause of action, not whether it has been properly plead.” *Sutphin Mgt. Corp. v. Rep 755 Real Estate, LLC*, 20 Misc. 3d 1135(A) (Sup. Ct.

2008), *order aff'd and remanded*, 73 A.D. 3d 738 (2d Dep't 2010). Dismissal of a claim is appropriate if the claim is made up of “[a]llegations that consist of bare legal conclusions or factual claims that are flatly contradicted by documentary evidence or are inherently incredible.” *Napoli v. Bern*, 60 Misc. 3d 1221(A) (Sup. Ct. 2018), *aff'd sub nom, Napoli v. New York Post*, 175 AD3d 433 (1st Dep't 2019), *citing, Hyman v. Schwartz*, 127 A.D.3d 1281, 1283 (3d Dep't 2015).

Here, this Court finds that plaintiff failed to state a cause of action for conversion. A claim for conversion arises when someone, “intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession.” *Makris v. Quartz Assoc., LLC*, 2022 N.Y. Slip Op. 32297[U], 6 [N.Y. Sup Ct, New York County 2022], *quoting, Halvatzis v. Perrone*, 199 A.D.3d 785 (2d Dep't 2021). Plaintiff, in his complaint, states:

“Defendant Monika Kozłowska with intent and action, has interfered with plaintiff's ownership rights and possession to his property, mainly office files handled by Monika Kozłowska when she worked at plaintiff's office, including confidential documents and files belonging to plaintiff, electronically stored information, and more.”

This Court finds that plaintiff failed to state any specific documents or files that defendant Kozłowska allegedly exercised control over, and plaintiff also fails to provide a date, time, or any actual details relating to the conversion claim.

Furthermore, plaintiff has failed to state a cause of action for trespass to chattel. “The tort of trespass to chattel consists of intentionally dispossessing another of the chattel or using or intermeddling with a chattel in another's possession. Liability will attach if the possessor is dispossessed of the chattel; the chattel is impaired as to condition, quality, or value; or the possessor is deprived of the use of the chattel for a substantial time.” *Hecht v. Components Intern., Inc.*, 22 Misc. 3d 360, 369 (Sup. Ct. 2008). Plaintiff failed to state, with specificity, what property of his was intermeddled with, or the condition of the property, and merely stated a general claim that defendants were interfering with plaintiff's property.

This Court also finds that plaintiff failed to state a cause of action for defamation, libel, and slander. “In determining whether the statement is reasonably susceptible of a defamatory meaning, the court must examine not only the particular words claimed by the plaintiff to be defamatory but the entire communication in which those words appeared.” *Ava v. NYP Holdings, Inc.*, 64 A.D. 3d 407, 413 (1st Dep't 2009). Plaintiff provides no specific statements said by defendants that were defamatory. Plaintiff merely states in his complaint:

“Defendant Monika Kozłowska has been defaming plaintiff and making damaging and untrue things about the plaintiff to third parties, causing damage to the plaintiff's reputation. The assignors, who are in the business of real estate landing, developing and leasing are being damaged by the defamation that is being done by defendant Monika Kozłowska who is also familiar with many people in the same industry.”

Here, the plaintiff does not set forth *any* evidence of defendant Kozłowska's alleged defamatory statements, therefore, plaintiff does not have a viable cause of action for defamation or libel and slander.

This Court finds that plaintiff fails to state a cause of action for extortion, blackmail, fraud, coercion, theft and deceit. “Although extortionate behavior, coercion and duress may be elements of

a cause of action for tortious interference with contract or unjust enrichment, at common law there was never a private cause of action for extortion. Rather, extortion, as it has come to be understood today—obtaining of money by force or fear—was considered robbery to be punished criminally.” *Minnelli v. Soumayah*, 41 A.D. 3d 388, 389 (1st Dep’t 2007). As blackmail, extortion, and coercion are criminal causes of action, the Court in this civil case cannot declare that any defendant is in violation of any provision of the Penal Law. Additionally, *CPLR §3016* requires a cause of action based upon fraud to be pleaded with particularity. Here, the plaintiff does not mention the elements of fraud in his complaint or memorandum of law in opposition to defendants’ motion, nor does plaintiff state any evidence to prove a cause of action for fraud. Further, plaintiff does not state the specific property in question that has allegedly been stolen by defendants, thus plaintiff does not have a cause of action for theft.

Likewise, plaintiff failed to state a cause of action for deceit. “A violation of *Judiciary Law § 487* may be established either by the defendant's alleged deceit or by an alleged chronic, extreme pattern of legal delinquency by the defendant.” *Duszynski v. Allstate Ins. Co.*, 107 A.D. 3d 1448, 1449 (4th Dep’t 2013). Plaintiff does not set forth any evidence to show how defendants’ conduct was deceitful, nor how plaintiff was misled by defendants’ conduct.

Lastly, plaintiff fails to state a cause of action for intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages. Plaintiff does not set forth evidence to show that defendants “by extreme and outrageous conduct intentionally or recklessly caused severe emotional distress to another.” *The Restatement (2nd) of Torts, §46*. Plaintiff states he was scared by defendants alleged blackmail and had suffered physical and mental pain, but does not delineate any specific evidence of the severe emotional distress he encountered as a result of defendants' supposed conduct. Plaintiff merely asserts bare conclusions without any factual evidence to support his claims.

Moreover, plaintiff failed to state a cause of action for negligent infliction of emotional distress. “While physical injury is no longer a necessary element, a cause of action to recover damages for negligent infliction of emotional distress must generally be premised upon conduct which ‘unreasonably endangers’ the plaintiff's physical safety.” *Glendora v. Gallicano*, 206 A.D. 2d 456 (2d Dep’t 1994). Plaintiff did not provide any evidence of how defendants’ conduct threatened plaintiff’s physical safety. Additionally, plaintiff is not entitled to punitive damages due to the lack of evidence provided in plaintiff’s complaint and memorandum of law in opposition to defendants’ motion. “Punitive damages may be awarded for the conscious disregard of the rights of others or for conduct so reckless as to amount to such disregard.” *Randi A.J. v. Long Is. Surgi-Ctr.*, 46 A.D. 3d 74, 85 (2d Dep’t 2007). Further, New York does not recognize an independent cause of action for punitive damages. *Id.* at 80. All in all, plaintiff has failed to set forth any evidence to overcome defendants’ motion to dismiss, thus, this Court must grant defendants’ motion to dismiss in its entirety.

Accordingly, it is

ORDERED that defendants’ motion to dismiss is GRANTED in its entirety as plaintiff failed to state a cause of action for conversion, trespass to chattel, defamation, libel, slander, extortion by attorneys, fraud and deceit, theft, coercion, extortion, blackmail, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages; and it is further

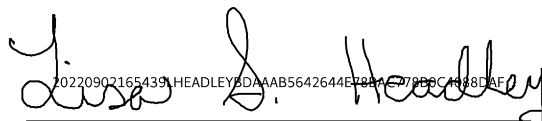
ORDERED that the within action is DISMISSED with prejudice as for defendants Monika Kozłowska, Gary Certain, Michael A. Zilberg, Patrick Griesbach, Zachary Weisberh, Douglas Herring, and Certain & Zilberg, PLLC; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, defendants shall serve a copy of this decision/order upon plaintiff with notice of entry.

This constitutes the Decision and Order of the Court.

9/2/2022
DATE


LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE