

**Association Des Senegalais D'Amerique, ASA, Inc. v
Barry**

2023 NY Slip Op 31684(U)

May 19, 2023

Supreme Court, New York County

Docket Number: Index No. 155010/2022

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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ASSOCIATION DES SENEGALAIS D'AMERIQUE, ASA, INC.,SADIO YAYA BARRY, MAMADOU DRAME,	INDEX NO. <u>155010/2022</u>
Plaintiff,	MOTION DATE <u>02/15/2023</u>
- v -	MOTION SEQ. NO. <u>001</u>
ELHADJ A. BARRY,	
Defendant.	DECISION + ORDER ON MOTION

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38
were read on this motion to/for DISMISS.

In this action alleging defamation per se and tortious interference, pro se defendant Elhadj A. Barry (“Defendant”) moves to dismiss the Verified Complaint in its entirety. Plaintiffs Association des Senegalais d’Amerique, ASA, Inc. (“ASA”), Sadio Yaya Barry, and Mamdou Drame (collectively, “Plaintiffs”) oppose the motion.

In 2020, Defendant allegedly purchased a plot of land in Dakar, Senegal for \$11,500 pursuant to a program run by ASA. However, he purportedly changed his mind at some point after the purchase and requested a refund. Plaintiffs state that they advised Defendant that they would not be able to refund him the purchase price as the funds had been used to purchase the property in question and that the deed was available for Defendant to pick up at the ASA offices. However, they claim that Defendant failed to retrieve the deed to the property he purchased, even though it was available in the ASA office.

Afterwards, Defendant allegedly made disparaging comments about Plaintiffs. For instance, he allegedly accused them of being “scammers” who refused to refund his money while speaking on a radio show in July 2021. In a later broadcast, aired in December 2021, Defendant allegedly falsely stated that some ASA members possessed fraudulent dual citizenships and that ASA had arranged for fake marriages for immigration purposes.

Plaintiffs commenced this action on June 14, 2022. They assert causes of action for tortious interference with business relations, defamation per se, injunctive relief prohibiting Defendant from engaging in his alleged campaign of defamation, and for a declaratory judgment that Defendant’s conduct constitutes unlawful tortious conduct.

Defendant now moves to dismiss the action on the grounds that “the [Verified] Complaint . . . contradict[s] the real story of what happened” (NYSCEF Doc. No. 18, Defendant aff). In his account, he paid ASA \$11,500 to purchase land in Senegal to which ASA did not have title. Defendant claims to only have discovered this upon travelling to Senegal to finalize the purchase. He contends that Plaintiffs promised to compensate him with another parcel of land and that, upon visiting Senegal a second time, Plaintiffs “never showed up” (*id.*). He subsequently sought mediation through the Attorney General’s Office and, after settlement failed, he sued them in Bronx Civil Court. Defendant annexes documents that purportedly support his version of events including text messages with plaintiffs Yaya Barry and Mamadou Drame, letters from the Attorney General’s Office, and copies of various case scheduling orders from the Bronx Civil Court action.

In their opposition, Plaintiffs argue that Defendant fails to tender documentary evidence that utterly refutes the factual allegations in the Verified Complaint such that a defense to each cause of action would be established as a matter of law. They further maintain that the Verified

Complaint sufficiently states a cause of action for each claim. In support of their opposition, Plaintiffs submit documents of the purported sale to Defendant, including a translated and consularized copy of a Senegalese deed conveying a parcel in the Dakar region to Plaintiff.

On a motion to dismiss, courts must accept as true the facts as alleged in the complaint and grant plaintiffs every possible inference (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). Although favorable inferences are presumed to be true, they “may be properly negated by affidavits and documentary evidence” (*Whilhelmina Models, Inc. v Fleisher*, 19 AD3d 267, 269 [1st Dept 2005], quoting *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). This may occur pursuant to CPLR 3211(a)(1) “where the documentary evidence utterly refutes a plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]; see also *511 W. 232nd Owners Corp v Jennifer Realty Co*, 98 NY2d 144, 152 [2002]). Alternatively, a complaint may be dismissed in whole or in part pursuant to CPLR 3211(a)(7) where its claims rest upon “factual allegations which fail to state a viable cause of action” or “that consist of bare legal conclusions” (*Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006]).

Here, Defendant’s purported documentary evidence neither “utterly refute[s]” nor “conclusively establish[es] a defense as a matter of law” to Plaintiffs’ claims of defamation per se or tortious interference (*Goshen*, 98 NY2d at 326). The Court is unable to discern how these documents would refute or establish a defense to Plaintiffs’ tortious interference claims as they do not mention any other contracts between Plaintiffs and third parties. As to the defamation per se cause of action, although Defendant’s text messages with Plaintiffs may be probative as to the truth of his public statements about having been misled by Plaintiffs, on their own they do not

conclusively establish the truth of Defendant's statements or otherwise utterly refute the factual allegations claims in the Verified Complaint.

However, the Court does find that Plaintiffs fail to state a cause of action for tortious interference. A plaintiff asserting tortious interference "must show the existence of its valid contract with a third party, defendant's knowledge of that contract, defendant's intentional and improper procuring of a breach, and damages" (*White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]). Here, the Verified Complaint merely contains the conclusory assertion that "Defendant's unlawful and malicious actions tortiously interfered with Plaintiffs' business relations with ASA members" (NYSCEF Doc. No. 2, Verified Complaint ¶ 14).

Plaintiffs fail to allege the existence of any contracts between ASA and its membership of which Defendant had knowledge, much less Defendant's knowledge of such contracts or his improper procurement of their breach. Accordingly, the first cause of action is dismissed.

A plaintiff states a cause of action for defamation per se by alleging "(1) a false statement that is (2) published to a third party (3) without privilege or authorization and that (4) . . . is one of the types of publications actionable regardless of harm" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014]). Statements that tend to injure the plaintiff in his or her trade, business or profession can constitute defamation per se (*Lieberman v Gelstein*, 80 NY2d 429, 435 [1992]). "In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application may be stated generally" (CPLR 3016[a]).

The allegations in the Verified Complaint are sufficient to sustain Plaintiff's defamation cause of action. They allege with particularity that Defendant falsely called them "scammers" for not returning his \$11,500 and failure to tender the deed to the property he believed he had purchased, that he published these statements during at least one radio and online broadcast, and

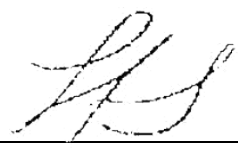
that he did so without Plaintiffs’ permission. Finally, they adequately plead defamation per se by claiming that, in accusing them of fraudulent conduct, Defendant’s accusations tend to injure Plaintiffs’ trade, business, or profession, in light of the allegation that ASA runs a program in which its members can purchase property in Senegal at a reasonable price. The branch of the motion seeking dismissal of the second cause of action is therefore denied.

Defendant’s motion is denied as to Plaintiffs’ causes of action for an injunction and declaratory judgment, respectively, to the extent that Plaintiffs seek this relief with respect to their defamation claim.

Accordingly, it is hereby:

ORDERED that the motion is granted as to the cause of action for tortious interference, which is hereby dismissed; and it is further

ORDERED that the remainder of the motion is denied.

5/19/2023			
DATE			LORI S. SATTLER, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE