Collins v Lindstrom
2019 NY Slip Op 34156(U)
August 26, 2019
Supreme Court, Kings County
Docket Number: 500275/2019
Judge: Richard Velasquez

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At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 26th day of AUGUST 2019.

P R E S E N T:
HON. RICHARD VELASQUEZ
Justice.

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JENNIFER COLLINS,

Plaintiffs,

Index No.: 500275/2019

-against-

Decision and Order

CHRISTOPHER ROCKEFELLER LINDSTROM,

Defendants.

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The following *papers* numbered 3 to 11 read on this motion:

Papers	Numbered
Notice of Motion/Order to Show Cause Affidavits (Affirmations) Annexed	3-6
Opposing Affidavits (Affirmations)	10-11
Reply Affidavits (Affirmations)	9
Memorandum of Law	7, 9

After oral argument and a review of the submissions herein, the Court finds as follows:

Defendant, CHRISTOPHER ROCKEFELLER LINDSTROM, move pursuant to CPLR 3211(a)(7), dismissing the complaint in its entirety. Plaintiff opposes the same.

MS #1

ARGUMENTS

Defendant, CHRISTOPHER ROCKEFELLER LINDSTROM, contends the plaintiff's bare and conclusory allegations concerning alleged defamation/libel and intentional infliction of emotional distress each fail to state a claim as there are no actual words contained in the complaint with regard to the libel claim. Additionally, the defendant contends the statements made were not false.

In opposition plaintiff contends, the evidence provided specify the particular words complained of and show that such words are patently false. Additionally, plaintiff, contends they have shown the requisite degree of harm that caused the plaintiff to be "exposed to public contempt, ridicule, aversion or disgrace or induce an evil opinion of her in the minds of right-thinking persons."[1]

ANALYSIS

Pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Morone v. Morone*, 50 NY2d 481, 484, 429 NYS2d 592, 413 NE2d 1154; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634, 389 NYS2d 314, 357 NE2d 970). **"The criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"** (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182, 372 NE2d 17; *Rovello v. Orofino Realty Co.*, 40 NY2d at 636, 389 NYS2d 314, 357 NE2d 970). **"[B]are legal conclusions and factual**

[1] It is noted both parties refer to exhibits annexed to plaintiff's affirmation annexed to the complaint, however, there is no affirmation annexed to the complaint submitted in this motion and no exhibits annexed thereto for the court to review.

claims which are flatly contradicted by the evidence are not presumed to be true on such a motion" (*Palazzolo v. Herrick, Feinstein, LLP*, 298 AD2d 372, 751 NYS2d 401). If the documentary proof disproves an essential allegation of the complaint, dismissal pursuant to CPLR 3211(a)(7) is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (see *McGuire v. Sterling Doubleday Enters., LP*, 19 AD3d 660, 661, 799 NYS2d 65). **"Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims ... plays no part in the determination of a pre-discovery 3211[a][7] motion to dismiss"** (*Shaya B. Pac., LLC v. Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38; s*ee EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 832 NE2d 26, 799 NYS2d 170 (Ct of Appeal 2005; *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275, 372 NE2d 17 (1977).

First, the court will address the plaintiff's cause of action for libel. "The elements of defamation are that a false statement about a plaintiff was published to a third party, without privilege or authorization" (*see Knutt v. Metro Intl., S.A.*, 91 AD3d 915, 916, 938 NYS2d 134); *quoting Diorio v. Ossining Union Free Sch. Dist.*, 96 AD3d 710, 712, 946 NYS2d 195, 198 (2012). A cause of action for libel is further governed by CPLR 3016. CPLR 3016(a) provides, "In an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." NY CPLR 3016 (McKinney). While CPLR 3016(a) merely requires that "the particular words complained of ... be set forth in the complaint," the courts have imposed additional pleading requirements on the statute. For example, in *Arvanitakis v. Lester*, 145 AD3d 650, 651, 44 NYS3d 71, 72-73 (2d Dep't 2016), "the court held that the

complaint must "set forth the particular words allegedly constituting defamation (see CPLR 3016[a]), and it must also allege the time, place, and manner of the false statement and specify to whom it was made." *See Dillon v. City of New York*, 261 AD2d 34, 38, 704 NYS2d 1, 5 (1st Dep't 2009), see also comments NY CPLR 3016 (McKinney). "This requirement is strictly enforced, and the exact words must be set forth. Any qualification in the pleading thereof by use of the words 'to the effect', 'substantially', or words of similar import generally renders the complaint defective." NY CPLR 3016 (McKinney).

In the present case, there are no specific words contained in the complaint, nor does the complaint set forth "the time, place, and manner of the false statement and specify to whom it was made." Although it seems that the specific language the plaintiff is referring to is the special note contained in the copy of her application annexed to her opposition papers for this motion, that language is not contained in the plaintiff's complaint. Nevertheless, the plaintiff also fails to meet the first element of a cause of action for libel which is a false statement about the plaintiff was published to a third party. The statement alleged is that the defendant contacted Nexus and stated he did not give his consent to use his name in her scholarship application as indicated on the application. In response, the defendant allegedly informed the plaintiff that he would be contacting Nexus to make them aware he did not consent to the use of his name in her application. This is not a false statement. The defendant did not agree to or give permission to the plaintiff to use his name on her application to the summit, and there is nothing before this court establishing otherwise. The plaintiff in opposition contends she never used his name on the application except for the section that states how did you hear about the summit, which is where she inserted the defendants name. Regardless, the defendant did not

publish a false statement the statement the defendant made was true. Therefore, the first element of libel which is a false statement is not met, and such claim must be dismissed.

Next the court will address the plaintiff's cause of action for intentional infliction of emotional distress. The tort has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." *quoting Howell v. New York Post Co.*, 81 NY2d 115, 121–22, 612 NE2d 699, 702–03 (1993). "The first element—outrageous conduct—serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine" (*see, Prosser, Insult and Outrage*, 44 Cal.L.Rev., at 44–45; *compare, Mitchell v. Rochester Ry. Co.*, 151 NY, at 110, 45 NE 354). Unlike other intentional torts, "intentional infliction of emotional distress does not proscribe specific conduct, but imposes liability based on after-the-fact judgments about the actor's behavior. Consequently, the "requirements of the rule are rigorous, and difficult to satisfy" (*Prosser and Keeton, Torts* 12, at 60–61 [5th ed]; *see also, Murphy*, 58 NY2d, at 303, 461 NYS2d 232, 448 NE2d 86 [describing the standard as "strict"]). Notably, all of the intentional infliction of emotional distress claims considered by the New York Court of Appeals, have failed because the alleged conduct was not sufficiently outrageous (*see, Freihofer v. Hearst Corp.*, 65 NY2d, at 143–144, 490 NYS2d 735, 480 NE2d 349; *Burlew v. American Mut. Ins. Co.*, 63 NY2d 412, 417–418, 482 NYS2d 720, 472 NE2d 682; *Murphy*, 58 NY2d, at 303, 461 NYS2d 232, 448 NE2d 86; *Fischer v. Maloney*, 43 NY2d, at 557, 402 NYS2d 991, 373 NE2d 1215); quoting Howell v. New York Post Co., 81 NY2d 115, 121–22, 612 NE2d 699, 702–03 (1993). "Liability

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" (*Murphy*, 58 NY2d, at 303, 461 NYS2d 232, 448 NE2d 86, *quoting Restatement [Second] of Torts* 46, comment d); *quoting Howell v. New York Post Co.*, 81 NY2d 115, 121–22, 612 NE2d 699, 702–03 (1993).

In the present case, it **cannot** be said that a person informing a company that they did not give an applicant permission to use their name on their application is "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". *Id.* In fact, it is wholly conceivable that any person would do the same when someone did not have permission to use their name. As such the first element of intentional infliction of emotional distress cannot be met. Therefore, the cause of action for intentional infliction of emotional distress must be dismissed.

Accordingly, defendants request to dismiss the plaintiff's complaint in its entirety is hereby granted, for the reasons stated above

This constitutes the Decision/Order of the Court.
Date: August 26, 2019

RICHARD VELASQUEZ, J.S.C.

So Ordered
Hon. Richard Velasquez
AUG 26 2019

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