Park Premium Enter. Inc. v Kahan
2024 NY Slip Op 32270(U)
June 25, 2024
Supreme Court, Kings County
Docket Number: Index No. 504991/2020
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: CCP

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PARK PREMIUM ENTERPRISE INC.
D/B/A PARK DEVELOPERS & BUILDERS,

Plaintiff, Decision and order

- against - Index No. 504991/2020

JOSEPH KAHAN,

Defendant, June 25, 2024

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #9 & #10

The plaintiff has moved pursuant to CPLR §2221 seeking to reargue a decision and order dated March 7, 2024. The defendant has cross-moved seeking to vacate the prior order on the grounds other decisions had already resolved the motion rendering the order moot. The motions have been opposed respectively. Papers were submitted by the parties and after reviewing all the arguments this court now makes the following determination.

As recorded in the prior order the plaintiff, a general construction contractor, asserts the defendant told lies about the plaintiff and its principal Aaron Leibovits accusing Leibovits of being a thief and urging no one in their close community to hire the plaintiff. The complaint alleges causes of action for libel, prima facie tort, tortious interference with business and contractual relations and an injunction.

In the prior order the court held the plaintiff must establish reasonable damages sustained by plaintiff's alleged conduct. Further, the court ordered the plaintiff to produce its

general ledger so that an evaluation of the income earned by the plaintiff could be examined and compared with alleged losses sustained following the plaintiff's alleged slander.

The plaintiff now seeks to reargue that determination asserting that the general ledger will not support any claim of lost opportunities because lost opportunities by definition are not recorded. The plaintiff argues that "a hypothetical plaintiff may generate $1,000,000.00 in revenue in one year and $2,000,000.00 in revenue the following year *and still* have suffered opportunity loss if they had been in a position to generate an amount in excess of $2,000,000.00 but for the conduct of the named defendant(s)" (see, Affirmation in Support, §18 [NYSCEF Doc. No. 131]). The plaintiff further argues that no damages are required when the allegations consist of defamation per se.

Conclusions of Law

A motion to reargue must be based upon the fact the court overlooked or misapprehended fact or law or for some other reason mistakenly arrived at in its earlier decision (Deutsche Bank National Trust Co., v. Russo, 170 AD3d 952, 96 NYS3d 617 [2d Dept., 2019]).

It is well settled that, absent any exceptions, allegations of slander must be pleaded with a claim that special damages were

sustained (Cammarata v. Cammarata, 61 AD3d 912, 878 NYS2d 163 [2009]). Special damages is "the loss of something having economic or pecuniary value" (Matherson v. Marchello, 100 AD2d 233, 473 NYS2d 998 [2d Dept., 1984] abrogated by Laguerre v. Maurice, 192 AD3d 44, 138 NYS3d 123 [2d Dept., 2020]). Thus, allegations the defendant falsely threatened someone's life would not constitute defamation because, even if true, there was no showing of any pecuniary loss (Hassig v. FitzRandolph, 8 AD3d 930, 779 NYS2d 613 [3rd Dept., 2004]). However, special damages do not need to be pleaded in cases where the defamation is per se, ie., the defamation is clear from the publication itself (Blumenstein v. Chase, 100 AD2d 243, 473 NYS2d 996 [2d Dept., 1984]). In the commercial context there are two instances of defamation per se, allegations the plaintiff committed a crime and allegations which tend to injure the trade, profession or business of the plaintiff (Liberman v. Gelstein, 80 NY2d 429, 590 NYS2d 857 [1992]). Thus, even if the allegations in this case are defamatory per se, a likely assetion, that does not obviate the plaintiff to demonstrate the extent of such damages sustained. Indeed, the exception to special damages merely dispenses with any proof necessary to demonstrate harm. It does not dispense with the requirement the plaintiff establish the extent of the harm. In Davis v. Ross, 107 FRD 326 [S.D.N.Y. 1985] the court acknowledged that slander per se means damages

are presumed. However, the court noted that "does not mean that information relating to the existence or amount of damages is irrelevant or not discoverable. General damages may be presumed, but defendant must be permitted to rebut the presumption, to try to disprove the existence of damage...Moreover, the amount of damages will always be in issue; plaintiff seeks one million dollars in compensatory damages, and evidence must be introduced to demonstrate that the award should be more than nominal" (id). Consequently, actual damages must be proven (Orlowski v. Koroleski, 234 AD2d 436, 651 NYS2d 137 [2d Dept., 1996]).

The plaintiff further argues the production of the ledger will not support any of the claims for damages since all the claims concern lost future opportunities which will not be reflected in the ledger. Lost opportunities is essentially lost profits. Concerning lost profits, although an element of uncertainty is always present, the plaintiff must demonstrate "a stable foundation for a reasonable estimate" of such damages (Wathne Imports Ltd., v. PRL USA Inc., 101 AD3d 83, 953 NYS2d 7 [1st Dept., 2012]). Thus, when claiming lost profits the plaintiff's financial reports concerning profit and loss is material and necessary and therefore must be produced (American Infertility of New York, P.C. d/b/a Center for Human Reproduction, and 21 East 69th Street LLC, v. Verizon New York Inc., 70 Misc3d 1001, 138 NYS3d 820 [Supreme Court New York

County 2020], see, also, Auburn Extrusions Inc., v. Auburn Armature Inc., 74 AD2d 716, 425 NYS2d 676 [4th Dept., 1980]). Indeed, these statements can be drawn from the tax returns themselves without producing the actual returns (American Infertility, (supra). There can be no principled opposition for the production of the plaintiff's records to demonstrate its profits and losses. Further, considering those records as well as any other information exchanged, the plaintiff must further prove the defendant's conduct caused future lost opportunities. If the defendant does not have an opportunity to examine the financial statements of the plaintiff it would have no reasonable way of assessing whether the alleged defamation actually caused any lost future profits. The defendant would have no way to ascertain whether the plaintiff's future income was actually a loss. The plaintiff argues that, hypothetically, a party can still make a profit but that the defendants conduct caused the profits to be less than expected. That may be true, however, even if that allegation can be gleaned from the complaint the plaintiff will still be required to prove such lost profits or lost increased profits. The defendant is entitled to discover the plaintiff's starting point, how much it earned over the past few years, to be ready to defend the allegations the defendant caused such future losses.

Therefore, based on the foregoing, the motion seeking to

reargue the prior determination is denied. The plaintiff must produce the documents ordered within thirty days of receipt of this order.

The defendant's cross-motion seeking to vacate the prior order dated March 7, 2024 is denied. The court's March 7, 2024 order more fully and comprehensively resolved the discovery issues concerning the tax returns and as such the March 7, 2024 order is the prevailing order regarding any matters contained in the March 7 order.

Therefore, the motion seeking to vacate the March 7, 2024 order is denied.

So ordered.

ENTER:

DATED: June 25, 2024
Brooklyn, N.Y.

Hon. Leon Ruchelsman
JSC