

Lewis v City of New York

2024 NY Slip Op 34047(U)

November 15, 2024

Supreme Court, New York County

Docket Number: Index No. 159541/2021

Judge: J. Machelles Sweeting

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. J. MACHELLE SWEETING PART 62

Justice

-----X

SHANE LEWIS,

Plaintiff,

- v -

CITY OF NEW YORK, KATAWBA DE LA ROSA,

Defendants.

-----X

INDEX NO. 159541/2021

MOTION DATE 02/23/2023

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 35, 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55

were read on this motion to/for JUDGMENT - SUMMARY.

In the underlying action, plaintiff Shane Lewis alleges the torts of defamation, tortious interference with a contract, and tortious interference with business relations. By way of background, during the times the alleged torts were committed, plaintiff and defendant Katawba De La Rosa (“Rosa”) were neighbors in the same apartment building, residing in different units on the same floor. Rosa was an employee of the Fire Department of defendant City of New York (the “City”). Oral arguments were heard before the court on September 28, 2023 and the matter adjourned on consent for further submissions.

The crux of plaintiff’s allegations, as set forth in the Complaint (NYSCEF Doc. No. 1), is that Rosa repeatedly and deliberately interfered with plaintiff’s employment at Judlau Contracting, Inc. (“Judlau”) by making false accusations against plaintiff, and that the City was complicit insofar that it allowed Rosa to use her employment with the New York City Fire Department (the “FDNY”) to further harass and threaten plaintiff.

Now pending before the court is a motion filed by defendant Rosa, who is *pro se*, seeking summary judgment in her favor.

Standard for Summary Judgment

The function of the court when presented with a motion for summary judgment is one of issue finding, not issue determination (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]; Weiner v. Ga-Ro Die Cutting, Inc., 104 A.D.2d331 [Sup. Ct. App. Div. 1st Dept. 1985]). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (Alvarez v. Prospect Hospital, 68 N.Y.2d 320 [NY Ct. of Appeals 1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851 [NY Ct. of Appeals 1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (Assaf v. Ropog Cab Corp., 153 A.D.2d 520 [Sup. Ct. App. Div. 1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395 [NY Ct. of Appeals 1957]).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact, and failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to

produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Alvarez v Prospect Hosp., 68 NY2d 320 [N.Y. Ct. of Appeals 1986]).

Further, pursuant to the New York Court of Appeals, “We have repeatedly held that one opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (Zuckerman v City of New York, 49 NY2d 557 [N.Y. Ct. of Appeals 1980]).

Arguments Made by the Parties

In her motion, Rosa argues that the Complaint against her should be dismissed on both substantive and procedural grounds.

With regard to the substantive grounds, Rosa argues that there are “vast amounts of videographic and documented Evidence” to show that plaintiff had a history of harassment, stalking, violence, sexual enticement, and making unwanted advances on “the entirety of Rosa’s family”; that plaintiff had an “utterly inexplicable obsession” with Rosa and her family; and that plaintiff had a known building-wide reputation for cocaine use, belligerence, and child enticement; and that plaintiff was known to be an “Emotionally Disturbed Person” within the building. Some of the incidents that Rosa details include the following:

On June 4, 2020, plaintiff, “in a state of apparent intoxication, attempted to commit arson” on Rosa’s door;

On or about August 24, 2020, plaintiff approached Rosa’s three-year-old daughter and the babysitter, offering the daughter a lollipop and asking the child to follow plaintiff into his apartment so he could give the child money;

On or about September 2, 2020, police officers arrived at Rosa's door, claiming that plaintiff had called 911 and falsely stated that Rosa's child was left home alone;

Plaintiff engaged in myriad attempts to undermine Rosa's employment with the FDNY, including reporting to Rosa's employer that Rosa was not working, when in fact Rosa was working from home. Because Rosa was being harassed in her "workplace" (i.e., her home), on September 16, 2020, Rosa filed a workplace violence report with her employer against plaintiff;

On or about October 2, 2020, as Rosa and her daughter exited their building, plaintiff grabbed his wife's walking cane and swung the cane at Rosa's child, threatening to hit her. Subsequently, Rosa filed a police report against plaintiff and plaintiff was charged with Menacing in the Second Degree, Endangering the Welfare of a Child, Criminal Possession of a Weapon in the Fourth Degree, and Harassment in the Second Degree.

On or about October 6, 2020, Rosa engaged the services of the Crime Victims Treatment Center's Legal Services Program ("CVTC") and on or about October 7, 2022, the CVTC sent a cease and desist letter to plaintiff and plaintiff's wife.

On or about October 7, 2020, Rosa wrote "numerous letters to multiple agencies" that assist with family and children services, asking for help regarding the behavior of plaintiff and his wife.

In or around Fall 2020, plaintiff told Rosa that plaintiff had hurt his hand while fighting with his wife, but that plaintiff planned to attribute the injury to a workplace accident. On or about October 22, 2020, Rosa wrote a letter "outlining the Plaintiff's myriad worker's compensation fraud," and sent the letter to Travelers, the worker's compensation insurance firm that provides coverage to plaintiff and other Judlau employees. On or about November 2020, Rosa was contacted by an insurance fraud investigator, John-Paul Gallo, who "shared that the Plaintiff, Shane Lewis, was already under investigation for fraud." On or about October 7, 2021, Rosa was asked to testify regarding accusations of fraud against plaintiff, and Rosa did so, under oath. Plaintiff was subsequently found to have committed fraud by the Worker's Compensation Board.

On or about December 1, 2020, Rosa's attorney from the CVTC was informed by the building landlord's attorney that the plaintiff was being relocated to another building "due to the sheer amount harassment, attempted sexual enticement, and threats he engaged in."

As to plaintiff's claims against her, Rosa denies committing any of the torts as alleged by plaintiff. With respect to tortious interference, Rosa argues that she merely reported plaintiff's harassment through the official channels of the FDNY, and "Judlau and I were in contact due to our mutual knowledge of the Fraud being committed by the Plaintiff and both shared fears that [the plaintiff] was not fit to work at the company." As to plaintiff's claim of defamation, Rosa argues that truth is a complete defense and the truthfulness of her statements is evidenced by the fact that the Worker's Compensation Board terminated plaintiff's worker's compensation payments.

With respect to procedural grounds, Rosa argues that this action should be dismissed because the Summons and Complaint were filed on October 19, 2021, but Rosa was not served until April 4, 2022, which is several months after the statutory deadline.

In opposition to Rosa's procedural argument, plaintiff contends that plaintiff took steps to serve Rosa in a timely manner by engaging the services of PM Legal, a professional process server, but service was not effectuated due to a clerical error on the part of PM Legal, and that as soon as plaintiff discovered this error, he immediately arranged for Rosa to be properly served. Plaintiff argues that Rosa waived her right to contest personal jurisdiction because she meaningfully engaged in this proceeding, by filing an Answer (NYSCEF Doc. No. 6) and an Amended Answer (NYSCEF Doc. No. 7), both of which included affirmative defenses, and by filing the instant motion, including supporting documents.

Plaintiff not only argues that "Rosa's motion fails to carry its burden of establishing her entitlement to relief as a matter of law," but that Rosa's statements in her moving papers are sufficient to grant summary judgment in plaintiff's favor.

Conclusions of Law

Plaintiff's request for summary judgment

First, the court notes that despite plaintiff's arguments that summary judgment should be granted in his favor, plaintiff did not file a motion or cross-motion seeking such relief. Accordingly, plaintiff's application is not properly before the court and cannot be considered.

Rosa's application for dismissal on procedural grounds

Next, the court addresses that branch of Rosa's motion seeking dismissal on procedural grounds, namely that she was not timely served with the Complaint. It is undisputed that the Summons and Complaint were filed on October 19, 2021, and that all defendants should have been served with these documents within 120 days, or by February 16, 2022. Here, Rosa was not served until almost two months later, on April 4, 2022.

The exhibits submitted by plaintiff show that on October 26, 2021, about one week after the Complaint was filed, plaintiff's counsel sent an email to PM Legal asking them to serve the papers (NYSCEF Doc. No. 50). Contrary to plaintiff's contention that "PM Legal confirmed receipt" of the service packet plaintiff's own exhibits fail to show any such confirmation from PM Legal. Rather, the record shows that it was not until March 24, 2022, more than a month *after* the service deadline, that plaintiff sent a follow up email to PM Legal inquiring about the status of service in this case (NYSCEF Doc. No. 51). The following day, on March 25, 2022, PM Legal replied, saying, "Service was not completed [...] the assignment might have gone to spam and [was] never entered" (NYSCEF Doc. No. 51).

Rather than file a motion seeking leave of court to serve Rosa late, plaintiff instead disregarded the lateness and served Rosa a week later, on April 4, 2022. While plaintiff attempts to blame the delayed service on Rosa by arguing that “the reason for the delayed service was [Rosa’s] actions and obfuscations,” and that plaintiff “would have known” that he needed to make a motion allowing for late service, had Rosa done her part in bringing late service to his attention,” this court finds plaintiff’s argument to be unavailing.

Nevertheless, as plaintiff correctly argues, Rosa consented to this court’s jurisdiction and waived any alleged defenses with regard to service by filing an Answer and an Amended Answer and filing a notice of appearance (NYSCEF Doc. No. 006) which states “that the undersigned Defendant hereby appears in the above-entitled action and demands that a copy of the Verified Complaint and all other papers in this action be served upon the Defendant.” No where in the pleadings did Rosa object to the court’s jurisdiction on procedural grounds (*see, e.g., McGowan v Hoffmeister*, 15 AD3d 297 [1st Dept 2005] [“Although their answer alleged eight affirmative defenses, it failed to assert the affirmative defense of lack of personal jurisdiction. Nevertheless, on or about August 25, 2003, the Hoffmeisters moved to dismiss the complaint on the grounds that the court lacked personal jurisdiction. However meritorious the affirmative defense might have been, the law is settled that a jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer dismissal motion pursuant to CPLR 3211, is waived. By appearing in the action and electing to answer the complaint without an objection to jurisdiction, defendants conferred jurisdiction upon the court and waived the defense”]).

Accordingly, the court declines to dismiss the Complaint against Rosa on the grounds that the Summons and Complaint were not timely served.

Rosa's application for dismissal on substantive grounds

Finally, the court turns to that branch of Rosa's motion seeking dismissal on substantive grounds. While Rosa denies having committed any of the torts alleged by plaintiff, she admits in her Amended Answer to the allegations set forth paragraphs 18, 19, 20-24, 33 and 34 of the Verified Complaint, which state:

18. On or about October 22, 2020, before the matter was resolved in court, Defendant De La Rosa wrote a letter with baseless defamatory statements against Plaintiff and sent the records from the incident to Plaintiff's employer, Judlau Contracting, Inc, Claimant's Union, and the Federal Bureau of Investigations.
19. In this letter, Defendant De La Rosa made several heinous accusations against the Plaintiff
20. Defendant De La Rosa stated that Plaintiff "**misrepresents the brand.**"
21. Defendant De La Rosa stated that Plaintiff "**lures children into his apartment with candy and gifts.**"
22. Defendant De La Rosa stated Plaintiff "**threatens harm to the children of women who decline his sexual advances.**"
23. Defendant De La Rosa stated that Plaintiff "**engages in illicit drug use.**"
24. Defendant De La Rosa also forwarded the documents from the October 2, 2020, arrest.
33. Defendant De La Rosa told Plaintiff's union that Plaintiff filed a fraudulent claim and that he did not injure his hand at work.
34. Defendant De La Rosa further claimed that Plaintiff injured himself during an argument with his wife and that he was attempting to shift liability to his employer.

As the City properly argues, there has yet to be a Preliminary Conference in this matter and no depositions of any party have been held. Given the numerous questions that remain, summary judgment is not appropriate this time.

Conclusion

For the reasons stated above, it is hereby:

ORDERED that plaintiff’s application for summary judgment is **DENIED** as not properly before the court; and it is further

ORDERED that any further applications made by plaintiff must be made in compliance with the CPLR and must be properly noticed upon all parties; and it is further

ORDERED that the branch of Rosa’s motion seeking dismissal of the Complaint against her on procedural grounds (untimely service) is **DENIED**; and it is further

ORDERED that the branch of Rosa’s motion seeking dismissal of the Complaint on substantive grounds is **DENIED** without prejudice as premature; and it is further

ORDERED that Rosa may, at her election, file another motion for summary judgment after relevant discovery has been conducted in this case.

11/15/2024
DATE



J. MACHELLE [unclear], 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