

Seneca v Cangro

2018 NY Slip Op 33404(U)

November 27, 2018

Supreme Court, Richmond County

Docket Number: 152031/2017

Judge: Wayne M. Ozzi

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This opinion is uncorrected and not selected for official publication.

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

-----X
ANTHONY SENECA,

Plaintiff,

-against -

EMIL CANGRO and CARLO CANGRO,

Defendants.
-----X

Part 23

Present:

HON. WAYNE M. OZZI

DECISION AND ORDER

Index No. 152031/2017

Motion No: 3321-002

The following papers numbered 1 to 2 were fully submitted on the 27th day of September 2018:

Papers Numbered

Defendants' Notice of Motion to Dismiss Complaint (Affirmation, Affidavits in Support) (Dated: August 2, 2018).....	1
Affirmation in Opposition to Dismissal (Dated: September 20, 2018).....	2

Upon the foregoing papers, defendants' motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a) (1), (7) is granted.

This matter arises out of alleged defamatory statements made by defendants Emil and Carlo Cangro (hereinafter "Cangro"), against their uncle, the plaintiff Anthony Seneca, during commencement of Cangro's underlying litigation for a judicial dissolution and accounting of three family businesses¹. The parties (along with two other entities named in the dissolution actions) are

¹ Plaintiff claims that the actionable statements are found in the September 9, 2016 Second Amended Verified Petition(s), sworn by Cangro, who filed these actions in Supreme Court, Richmond County, under Index Numbers 85036/2016, 85037/2016 and 85039/2016 (see paragraph 10 of plaintiff's September 27, 2017 Amended Verified Complaint; Cangro's Exhibit A). Cangro subsequently withdrew their Petitions, and the actions were discontinued without prejudice. Cangro commenced three actions on February 15, 2018, for judicial dissolution, accounting, and

the owners of C. Seneca Construction, Inc., Clove Road Development, LLC, and Flag Place Development, LLC.

Plaintiff seeks damages under eight causes of action (i.e.: [1] libel, [2] libel *per se*, [3] defamation, [4] defamation *per se*, [5] intentional infliction of emotional distress, [6] negligent infliction of emotional distress, [7] commencement of a sham litigation without standing, and [8] malicious prosecution) for injuries allegedly sustained to his reputation as a result of the statements sworn by Cangro in their September 9, 2016 Petitions.

In moving for judgment pursuant to CPLR §§3211(a)(1) and (a)(7) dismissing the plaintiff's amended Verified Complaint, Cangro argues that the "FIRST" "SECOND" "THIRD" "FIFTH" and "SIXTH" causes of action (for libel, libel *per se*, defamation, defamation *per se*, and intentional infliction of emotional distress) must be dismissed because the complained-of statements are protected by absolute privilege, as they were made solely within the context of – and relevant to - an adversarial litigation. By way of supportive evidentiary material, Cangro submits the September 9, 2016 Verified Petitions² to illustrate that the allegations against plaintiff (i.e., that he **“exerted sole control...and is diverting assets”** [see para 27]; **“enrich[ed] himself from assets and income...by his oppressive conduct”** [see para 28]; **“taken loans without consent”** [see para 30]; **“wasted and diverted assets”** [see para 35]; **“manipulated the books...[so that] there is no profit only losses for many years”** [see para 36]) were pertinent to the actions for a judicial dissolution and an accounting, and accordingly may not be used as the predicate for plaintiff's case *sub judice*.

legal fees in Richmond County under Index Numbers 85034/2018, 85035/2018 and 85036/2018. The 2018 actions are void of actionable statements against plaintiff.

² The Court notes that contrary to what is asserted in the Complaint, the word “thief” does not appear in any of the Verified Petitions.

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Cangro seeks dismissal of plaintiff’s “FOURTH” cause of action, for damages arising from the negligent infliction of emotional distress on the grounds that Cangro did not (1) unreasonably place plaintiff in fear of physical harm; (2) place plaintiff’s immediate family within a “zone of danger” of physical harm or (3) subject plaintiff to any “special circumstances” which would give rise to the negligent infliction of emotional distress (e.g., the negligent delivery of a false message of death). As for the “EIGHTH” cause of action, Cangro maintains that plaintiff may not avail himself of a cause of action for malicious prosecution, because he was not the subject of a criminal proceeding. Cangro does set forth a particular legal argument for the dismissal of plaintiff’s “SEVENTH” cause of action, for damages arising from the commencement of a sham proceeding.

In opposition to the motion, plaintiff claims that Cangro’s offensive statements are not privileged because they were made maliciously, gratuitously and abusively, as evidenced by the 2018 Verified Petitions, absent from which are the previously pled allegations that plaintiff engaged in, e.g., “illegal conduct, [the filing of] falsified tax returns, [the taking of] an improper \$207,000.00 loan from the corporation, or manipulation of the books.” Additionally, plaintiff argues that his intentional and negligent infliction of emotional distress claims withstand defendants’ motion, because plaintiff’s mental injury was a direct result of Cangro’s breach of duty of care. As for his claim of malicious prosecution, plaintiff sets forth that he may pursue that relief in this particular civil action, because the underlying actions brought by Cangro were “clearly filed” for purposes other than the adjudication of a claim. Finally, plaintiff argues that he has met the requisite elements of pleading a cause of action for *prima facie* tort/sham lawsuit (i.e., that he was the subject of the intentional infliction of harm, which resulted in special damages, without

excuse or justification, by an act or series of acts which are otherwise legal), thereby availing himself to pursue damages under his "SEVENTH" cause of action.

A complaint may be dismissed based upon documentary evidence pursuant to CPLR §3211 (a)(1) if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby (*see Sta-Bright Services, Inc. v. Sutton*, 17 AD3d 570 [2d Dept. 2005]; *Yew Prospect, LLC v. Szulman*, 305 AD2d 588 [2d Dept. 2003]). A motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law (*Guggenheimer v. Ginzburg*, 43 NY2d , 591 [2005] quoting *Leon v. Martinez*, 84 NY2d 83, 87 [1994]; *see CPLR 3026; Mandarin Trading Ltd. v. Wildenstien*, 16 NY3d 173, 178 [2011]). "The [dismissal] motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] quoting *Polonetsky v. Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001]). When evidentiary material is considered, however, the court is not required to accept as true " 'allegations consisting of bare legal conclusions...[or] factual claims inherently incredible or flatly contradicted by documentary evidence'" (*Biondi v. Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept. 1999; *citation omitted; emphasis supplied*), *affd* 94 NY2d 659 [2000]); rather, the Court must determine whether the proponent of the pleading **has a cause of action**, not whether he or she has stated one (*see Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977); *IIG Capital LLC v. Archipelago, LLC*, 36 AD3d 401, 402 [1st Dept. 2007]). Dismissal under CPLR 3211(a)(1) may be granted "where documentary evidence submitted conclusively establishes a defense to the

asserted claims as a matter of law” (*Goldman v. Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005] quoting *Held v. Kaufman*, 91 NY2d 425, 430-431 [1998]).

Here, the evidentiary evidence submitted (*i.e.*, the September 9, 2016 second Amended Verified Petitions) conclusively establishes that the alleged defamatory statements are privileged. Thus, plaintiff’s “FIRST”, “SECOND”, “THIRD”, “FIFTH” and “SIXTH” causes of action are dismissed.

It has long been held “that a statement made in the course of legal proceedings is absolutely privileged if it is **at all pertinent to the litigation**” (*Lacher v. Engel*, 33 AD3d 10, 13 [1st Dept. 2006] citing, *Youmans v. Smith*, 153 NY 214, 219 (1897); see *Pomerance v. McTiernan*, 51 AD3d 526, 528 [1st Dept. 2008]; emphasis supplied). “Whether a statement is ‘at all pertinent to the litigation’ is determined by an ‘**extremely liberal**’ test...[and] any doubts are to be resolved in favor of pertinence” (*Sexter & Warmflash, P.C. v. Margrabe*, 38 AD3d 163, 173 [1st Dept. 2007]; emphasis supplied). Consistent with the foregoing instruction, this Court finds that the subject statements contained in the second Amended Verified Petition were pertinent to Cangro’s litigation for an accounting or to dissolve the companies owned by the parties. Accordingly, plaintiff’s causes of action for libel, libel *per se*, defamation, defamation *per se*, and intentional infliction of emotional distress³ are dismissed.

The gravamen of a civil malicious prosecution cause of action is the wrongful initiation, procurement or continuation of a legal proceeding. “The tort of malicious prosecution requires proof of each of the following elements: (1) the commencement or continuation of a proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the plaintiff,

³ It is well settled that a cause of action for intentional infliction of emotional distress should be dismissed when it duplicates a plaintiff’s defamation claim (*Matthaus v. Hadjedj*, 148 AD3d 425, 425 [1st Dept. 2017]; see *Perez v. Violence Intervention Program*, 116 AD3d 601, 602 [1st Dept. 2014] *lv denied*, 29 NY3d 915 [2016]).

(3) the absence of probable cause for the proceeding and (4) actual malice” (*Facebook Inc. v. DLA Piper LLP (US)*, 134 AD3d 610, 613 [1st Dept. 2015][*dismissing claim under CPLR §3211*][*citations, alterations, and internal quotation marks omitted*], *lv denied*, 28 NY3d 903 [2016]). Here, there has been no final termination of the underlying actions, and on that basis alone plaintiff’s ‘EIGHTH’ cause of action must be dismissed (*see Black v. Green Harbour Homeowners’ Assn., Inc.*, 37 AD3d 1013, 1014 [3d Dept. 2007]). However, even if Cangro’s dissolution proceedings are terminated in favor of Mr. Seneca, this Court would dismiss plaintiff’s cause of action for malicious prosecution because plaintiff has not asserted facts sufficient to allege the absence of probable cause or actual malice (*see Facebook, Inc.*, 134 AD3d at 613).

Plaintiff’s “FOURTH” and “SEVENTH” causes of actions, for damages resulting from the negligent infliction of emotional distress and the commencement of a sham litigation, respectively, are likewise dismissed.

It is long settled that a valid claim for negligent infliction of emotional distress exists when an individual or entity owing a duty of care harms the plaintiff, resulting in emotional damages (*Ornstein v. New York City Health & Hosp Corp.*, 10 NY3d 1, 6 [2008]). These damages are recoverable even without physical injury, if the psychological damage results directly from defendants’ actions (*id.*, 10 NY3d at 6) and the breach “either unreasonably endangers a plaintiff’s physical safety or causes the plaintiff to fear for his or her own safety” (*E.B. Liberation Publications, Inc.*, 7 AD3d 566, 567 [2nd Dept. 2004]). The cause of action “must be based on allegations of conduct so extreme in degree and outrageous in character as to go beyond all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized community” (*Wolkstein v. Morgenstern*, 275 AD2d 635, 636-637 [1st Dept. 200]; *see Sheila C. v. Povich*, 11 AD3d 120, 130-131 [1st Dept. 2004]). It is for the court to decide whether the alleged

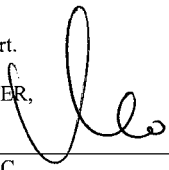
conduct is sufficiently extreme and outrageous to state a claim (*id.* at 637). This Court has no alternative but to dismiss plaintiff’s “FOURTH” cause of action, as the allegations against Mr. Seneca in the underlying actions fail to meet the criteria of “extreme in degree and outrageous in character as to go beyond all possible bounds of decency” (*Wolkstein v. Morgenstern*, 275 AD 2d at 637).

Finally, plaintiff’s “SEVENTH” cause of action, for *prima facie* tort in the form of commencement of “sham” litigation is dismissed. “A *prima facie* tort has been defined as ‘the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful’” (*Belsky v. Lowenthal*, 62 AD2d 319, 322 [1st Dept. 1978] [citation and internal quotation marks omitted], *aff’d*, 47 NY2d 820 [1979]). It is not “a catch-all alternative for every cause of action which cannot stand on its own” (*Freihofer v. Hearts Corp.*, 65 NY2d 135, 143 [1985] [citation and internal quotation marks omitted]). The courts have recognized that if an activity is found to be a sham (*i.e.*, to disguise what is otherwise nothing more than an attempt to directly injure an opposing party), then the challenged litigation may be objectively said to be meritless. Here, plaintiff has failed to submit evidentiary facts establishing that Cangro instituted a sham action for dissolution and accounting from the businesses owned by the parties.

In light of the foregoing, this Court finds that plaintiff has failed to establish that he has any cause of action against the defendants. Accordingly, defendants’ motion to dismiss the amended complaint is granted in its entirety.

This constitutes the decision and order of the Court.

ENTER,



Dated:

J. S. C.

HON. WAYNE M. OZZI
J.S.C.