

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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SANDRA PIEDRABUENA ABRAMS,

Plaintiff,

Index No. 110329/09
Mtn. Seq. 003,004

AMENDED DECISION

-against-

DANIELLE PECILE, CRISTINA CULICEA,
DOUGLAS WIGDOR and THOMSON WIGDOR &
GILLY, LLP,

Defendants.
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FILED
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NEW YORK
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WALTER B. TOLUB, J.:

Motion sequence 003 and sequence 004 are consolidated for disposition and disposed of in the following memorandum opinion.

By motion sequence 003, Defendants Danielle Pecile and Cristina Culicea move for an order awarding Defendants' costs and fees for having to defend against this action. By motion sequence 004, all of the Defendants move for an order dismissing the complaint (CPLR §3211), and for costs and sanctions.

Facts

In an unverified Amended Complaint brought by Plaintiff's counsel on her behalf, Plaintiff seeks injunctive relief and damages arising from what Plaintiff claims are stolen photographs of her appearing topless while on her honeymoon. Notably, to date, Plaintiff has not submitted any pleading or affidavit to the effect that she is even aware of this proceeding.

The real parties of interest in this proceeding are Russell

run a hedge fund known as Titan Capital, LLC (Titan). The Defendants are Danielle Pecile (Danielle), who was an executive assistant to Russell, and Cristina Culicea (Cristina), who worked at Titan as a receptionist.

Both Defendants have filed complaints with the Equal Employment opportunity Commission (EEOC) alleging sexual harassment, the details of which were the subject matter of articles in the New York Post. The last Defendant is the law firm of Thomson Wigdor & Gilly, LLP (TWG), the law firm representing Ms. Pecile and Ms. Culicea in the proceeding before the EEOC.

The Complaint alleges that Plaintiff and her husband, Russell honeymooned on a private boat in the Mediterranean, and that Russell took photographs of his wife, some of them while she was topless.

Six months later, in December of 2008, Russell decided he wanted to have prints made and create an album for Plaintiff's birthday. Russell made 2 CDs of the pictures and gave the CDs to his administrative assistant, Danielle, asking her to develop the pictures by dropping the CDs off at the Duane Reade pharmacy on the ground floor of the Chrysler Building, where Titan is located. Russell claims that Danielle then picked up the photographs and returned them in a sealed envelope. Russell claims that he never told Danielle what photographs were on the

CDs and never asked her to view the pictures. Concededly, one of the CDs was not returned.

Danielle and Marc, Russell's brother and business partner, were romantically involved. Russell claims that on April 8, 2009, the day Marc and Danielle broke up, Danielle resigned from Titan by letter stating "[p]lease accept this letter as my formal notice of resignation from Titan Capital Group, effective May 6, 2009. I have enjoyed my employment here and appreciate all I have learned." (Russell Aff. Ex. A to Complaint). That same day however, Danielle sent Russell an email stating that Marc was harassing her, and she could not return to work (Plaintiff's Ex. J).

Soon thereafter, Danielle and her co-worker/friend, Cristina, commenced a sexual harassment action with the EEOC (EEOC Action).

In the EEOC Action, Danielle and Cristina, through their attorney Douglas H. Wigdor of TWG, claim that from the onset of their employment at Titan they were subjected to sexual harassment that permeated the work environment.

As one of the basis for Danielle's claim of sexual harassment, she claims that on December 5, 2008, Russell gave her two copies of a CD containing pictures that he asked her to print at the Duane Reade at the Chrysler Building. Danielle claims that she inserted the CD into the photo machine and that all of

the pictures on the CD appeared. Danielle claims she was "shocked and appalled" to see that the CD contained topless pictures of Russell's wife. As soon as she was able to print the pictures, Danielle claims that she immediately returned them to Russell who at that time smirked and asked if she liked the pictures.

Danielle claims that she later realized that she inadvertently kept one of the CDs. When she was made aware of her mistake, she claims she "kept it because I was embarrassed to return it and believed it was evidence of the harassment that I was forced to experience during my employment." (Danielle Aff Mtn. Seq. 004 ¶9). She further claims that "I knew that if I later needed this evidence to substantiate what I had been going through he [Russell] would later deny their existence." (Id. ¶10).

Cristina's claims are similar in nature alleging vulgar and suggestive e-mails and, on one occasion, being required to view nude pictures of Mr. And Mrs. Abrams.

After being contacted by Mr. Wigdor, Danielle and Cristina's attorney, Russell claims that he learned for the first time that Danielle was in possession of the CD and photographs, and that she had annexed them to her papers in the EEOC Action. It was at this, the Complaint alleges, that Russell's wife, who was pregnant, also found out that Danielle had the pictures.

On June 1, 2009, Russell demanded that the pictures of his wife be returned. On June 2, 2009, Mr. Wigdor stated that the pictures would not be returned because they were evidence of Russell's unlawful actions. Additionally, Mr. Wigdor spoke to Steve Skalicky, Titan's Chief Operating Officer. Mr. Skalicky claims that Mr. Wigdor offered to return the pictures upon a settlement of Danielle and Cristina's claims for \$2.5 million. Mr. Wigdor, it is claimed, also offered to have a neutral third party be in possession of the photographs if the matter was not settled. The EEOC Action was not settled and this action soon followed.

Plaintiff, Mrs. Abrams, commenced this action for:
(1) Conversion; (2) Trespass to Chattel; (3) Intentional Infliction of Emotional Distress; (4) Prima Facie Tort; and (6) Replevin against Danielle, Cristina, Mr. Wigdor and his law firm TWG.

Defendants seek to dismiss the action and Defendants Danielle and Cristina seek an award of their costs and sanctions in having to defend this action arguing that this action is without merit and that it was filed as a preemptive action in retaliation to the EEOC Action.

Discussion

On a motion to dismiss for failure to state a cause of

action, the court accepts all the allegations of the complaint as true and affords the plaintiff all favorable inferences to be drawn from them (Barr, Atzman, Lipshie, Gerstman, *New York Civil Practice Before Trial*, [James Publishing 2009] §36:290). In ruling on the motion, the court decides whether the plaintiff can succeed on any reasonable view of the facts as stated and inferred (Id. citing Campaign for Fiscal Equity, inc v. State, 86 NY2d 307[1995]).

Claims Against Mr. Wigdor and TWG

Under New York law, attorneys are afforded immunity where their conduct arises out of the professional representation of their clients.

There is a general principle embodied in the law of the State of New York that attorneys should be free to advise their clients without fear of liability [to] third parties. However, the mere fact one is an attorney acting in a professional capacity does not make him absolutely immune from responsibility for his wrongful acts.

An attorney may be held personally liable to a third party who sustains an injury in consequence of his wrongful act of improper exercise of authority, where the attorney has been guilty of fraud, collusion or of a malicious or tortious act.

Beatie v. DeLong, 164 AD2d 104, 108 [1st Dept 1990].

Here, Plaintiff has not sufficiently alleged, let alone submitted any evidence, that Mr. Wigdor or his firm acted with either malice or bad faith or that they colluded with Danielle

and Cristina in some illegal manner. The "settlement" negotiations of May 2008, as heavy handed as they were, provide no basis for a recovery. Indeed, there is nothing to indicate from the Plaintiff herself that she was ever aware of the letters Mr. Wigdor sent. In the absence of fraud, collusion, malice or bad faith, Mr. Wigdor and TWG are immunized from liability under the shield afforded attorneys in advising their clients, even when such advice is erroneous. The Complaint as to Mr. Wigdor and TWG is dismissed(id.).

Claims Against Danielle and Cristina

Only "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress" Kaismen v. Hernandez, 61 AD3d 565, 566 [1st Dept 2009] citing Fischer v. Maloney, 43 N.Y.2d 553 [1978], quoting Restatement [Second] of Torts § 46[1]).

Prima facie tort requires a showing of intentional infliction of harm, without excuse or justification, by an act or series of acts that would otherwise be lawful, resulting in special damages (Kaismen v. Hernandez, 61 AD3d 565, 566 [1st Dept 2009] citing Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332 [1983])).

A cause of action for replevin or conversion requires a demand for the property and refusal (Feld v. Feld, 279 Ad2d 393,

394 [1st Dept 2001] *citing* Solomon R. Guggenheim Foundation v. Lubell, 77 N.Y.2d 311, 317-318; Douglas v. Christie's International, 226 A.D.2d 185). A demand need not use the specific word "demand" so long as it clearly conveys the exclusive claim of ownership. A demand consists of an assertion that one is the owner of the property and that the one upon whom the demand is made has no rights in it other than allowed by the demander (Feld v. Feld, 279 Ad2d 393, 395 [1st Dept 2001] *citing* Ford Garage Co. v. Brown, 198 AD 467). By the same reasoning, a refusal need not use the specific word "refuse" so long as it clearly conveys an intent to interfere with the demander's possession or use of his property (Feld v. Feld, 279 AD2d 393, 394 [1st Dept 2001] *citing* Rosalinda v. Kent Co. Inc., 86 AD2d 587).

Assuming Mrs. Abrams was aware of the existence of the photographs, "Plaintiff" sufficiently pleaded all causes of action as to the defendant Ms. Pecile. Counsel alleges that Danielle stole the photographs, and would not return them when demanded by Russell, that Danielle used the stolen photographs to harm Plaintiff whom Danielle knew was eight months pregnant at the time she commenced the EEOC. Plaintiff further claims that Danielle's actions caused complications during her pregnancy. At this stage of the proceeding the allegations are barely sufficient to withstand a motion to dismiss and accordingly the

motion is denied as to Defendant Danielle Pecile.

Plaintiff claims that Defendant Cristina Culicea caused severe emotional distress by demanding \$2.5 million for the return of her CD and threatening disclosure and publication of Defendants allegations to the New York Post and elsewhere. Additionally, Plaintiff claims that Cristina personally used these photographs to harm her.

Although a motion to dismiss addresses the sufficiency of a complaint and the facts pleaded are presumed to be true and accorded every favorable inference, allegations consisting of bare legal conclusions, as well as factual claims that are inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration (Kaisman v. Hernandez, 61 AD3d 565 [1st Dept 2009]; Kliebert v. McKoan, 228 A.D.2d 232 [1st Dept 1996], *lv. denied* 89 N.Y.2d 802, [1996]). Ms. Culicea did not take the pictures from Russell, nor is it claimed that she took the pictures or was ever in possession of them so that she could use them against Plaintiff or even return the photographs. The only act of Ms. Culicea that "seems" to have caused Plaintiff distress is that she exercised her legal right to file a complaint with the EEOC. There are no credible allegations in the Complaint upon which to predicate liability and, as such, Defendant Cristina Culicea's motion to dismiss the claims against her is granted.

As to Plaintiff's demand that the pictures be returned to her, the pictures are currently in the possession of a neutral third-party as agreed to (Tr. 7, ln. 4-11), and the Court need not address the return of the photos.

Sanctions and Fees

22 NYCRR 130-1.1 provides that the court, in its discretion, may award to any party or attorney in any civil action or proceeding sanctions and or costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. 22 NYCRR 130-1.1[c] provides that conduct is frivolous if:

1. It is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
2. It is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
3. It asserts material factual statements that are false.

(22 NYCRR 130-1.1[c]).

The animosity of the parties is evident from the pleadings and e-mails exchanged by the real parties in this case. Indeed, in another era the pleadings would have been the subject matter of a motion to strike under CPLR §3024(b). But lawyers, unlike clients, are bound by a higher code of conduct and, more particularly EC 7-37 and DR 7-102.

EC 7-37 provides that:

In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, and demeanor towards opposing lawyers. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system.

(EC 7-37).

Additionally, DR 7-102(A)(1) provides that:

- A. In the representation of a client, a lawyer shall not:
 - 1. File a suit, assert a position, conduct a defense, delay a trial, or take such other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

(DR 7-102(A)(1)).

However, it should be noted that on December 18, 2008, the Administrative Board of the New York Court announced that on April 1, 2009, New York would replace all of the existing Disciplinary Rules and Definitions in the New York Code of Professional Responsibility with the New York Rules of Professional Conduct (Rules). The Rules maintain much of the same language and substance of the existing New York Code of Professional Responsibility, drawing on both the Disciplinary Rules and the Ethical Considerations.

DR 7-102(A)(1) and DR 2-109 are now encompassed in Rule 3.1. As it related to DR 7-102(A)(1), Rule 3.1(b)(2) borrows the phrase "merely to harass or maliciously injure another" from the

DR and adds where the conduct "has no reasonable purpose other than to delay or prolong the resolution of litigation". (See also Rule 1.2(e), 1.16(a))

Rule 3.1(b)(2) provides that:

A lawyer's conduct is "frivolous" for the purposes of this Rule if:

(2) the conduct has no reasonable purpose other than to delay or prolong the resolution of litigation in violation of Rule 3.2, or serves merely to harass or maliciously injure another.

Rule 1.16(a)(1) provides:

(A) A lawyer shall not accept employment of behalf of a person if the lawyer knows or reasonably should know that such person wishes to:

(1) bring a legal action, conduct a defense, or assert a position in a matter, or otherwise have steps taken for such person, merely for the purpose of harassing or maliciously injuring any person;

It is clear to the Court that the Complaint as to Ms. Culicea and Mr. Wigdor has no basis in law and fact and could only have been brought to harass Ms. Culicea and the Wigdor law firm. As such, counsel's actions are sanctionable.

Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted to the extent that all claims against Ms. Culicea, TWG and Mr. Wigdor are dismissed and that the claims as to Ms. Pecile remain; and it

is further

ORDERED that Ms. Culicea's motion for reasonable attorneys' fees is granted; and it is further

ORDERED that Mr. Wigdor and TWG are entitled to sanctions in the amount of \$1,000 resulting from the frivolous claims asserted against them; and it is further

ORDERED that the issue of reasonable attorneys' fees to be awarded to Ms. Culicea is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Judicial Support Office to arrange a date for the reference to a Special Referee; and it is further

ORDERED that written proof of such payment be provided to the Clerk of Part 15 and opposing counsel within 30 days of service of a copy of this order with notice of entry; and it is

further

ORDERED that upon the failure of the Plaintiff to make such payment, Defendants may apply to the Court ex-parte for the entry of a money judgment in said amount; and it is further

ORDERED that the Clerk of the Court is directed to entered judgment dismissing the Complaint as to Ms. Culicea, Douglas Wigdor and Thomson Wigdor & Gilly, LLP.

Counsel for the parties are directed to appear for a preliminary conference on December 4, 2009 at 11:00 AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/4/09

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NOV 04 2009
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COUNTY CLERK'S OFFICE



HON. WALTER B. TOLUB, J.S.C.