

Malta v Gaudio

2020 NY Slip Op 30699(U)

March 5, 2020

Supreme Court, New York County

Docket Number: 653786/2019

Judge: Andrew Borrok

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

-----X

ROBERT MALTA

Plaintiff,

- v -

SALVATORE GAUDIO,

Defendant.

-----X

INDEX NO. 653786/2019

MOTION DATE 09/05/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24

were read on this motion to/for DISMISSAL

Upon the foregoing documents and for the reasons set forth on the record (3/3/2020), Salvatore Gaudio's motion to dismiss pursuant to CPLR §§ 3211(a)(1) and (7) is granted.

The Relevant Facts and Circumstances

Reference is made to a prior action captioned Robert N. DeBenedictis v Robert Malta and Salvatore Gaudio, Index No. 602537/2008 (the DeBenedictis Action) in which Mr.

DeBenedictis sued Mr. Malta and Mr. Gaudio. Apparently, on December 31, 2004, Mr.

DeBenedictis agreed to trade his interest in 1431 Second Avenue, 1435 Second Avenue, 1439

Second Avenue, and 11 Stone Street (collectively, the Properties) in exchange for Mr. Malta's in 81 Greenwich Street (NYSCEF Doc. No. 2, ¶¶ 18-25; the DeBenedictis Complaint).

Following the trade, Mr. DeBenedictis learned that Mr. Malta and Mr. Gaudio sold the Properties for amounts that were far in excess of the listed values that Mr. DeBenedictis received before the trade (id., ¶¶ 27-47). In the DeBenedictis Action, Mr. DeBenedictis alleged that "[p]rior to the

December 31, 2004 real estate trade, Gaudio never advised Plaintiff of the pending sale of 1431 Second” (*id.*, ¶ 34). In his Answer in the DeBenedictis Action, Mr. Gaudio denied the allegation at ¶ 34 of the DeBenedictis Complaint (NYSCEF Doc. No. 3, ¶ 8; the **Gaudio Answer**).

During the pendency of the DeBenedictis Action, Mr. Malta and Mr. Gaudio’s relationship soured and they decided to enter into a certain Settlement Agreement and Mutual Global Release (NYSCEF Doc. No. 10; the **Settlement Agreement**), dated January 26, 2012, by and between Mr. Gaudio, Mr. Malta, and other affiliated entities and individuals whereby the parties agreed to sever their business relationship. The Settlement Agreement included a non-disparagement clause:

[e]ach of RM [Malta] and SG [Gaudio] agrees that he it shall not, except done in good faith in any claim, suit, action or proceeding, make any negative, derogatory or disparaging statement or communication with the intent to harm the other. Nothing in this Section shall limit the ability of RM [Robert Malta] or SG [Salvatore Gaudio] to make true and accurate statements or communications that he reasonably believes is required pursuant to applicable law.

(*Id.*, ¶ 22).

In October 2013, Mr. Malta filed a motion for summary judgment in the DeBenedictis Action, in which Mr. Gaudio provided Mr. DeBenedictis with a sworn affidavit, dated August 1, 2012, stating:

11. I never advised DeBenedictis of either the Second Avenue Group Sale or the Second Avenue Air Rights Sale prior to December 31, 2004.

12. Based on our prior business relationships and dealings in connection with the operation of GMD and LMS, I believed Malta advised DeBenedictis, prior to December 31, 2004, of the pending Second Avenue Group Sale and the Second Avenue Air Rights Sale after Malta and I had discussed them.

(NYSCEF Doc. No. 4, ¶ 11; the **Gaudio Affidavit**).

Pursuant to a Stipulation of Dismissal, dated August 14, 2012, Mr. DeBenedictis discontinued the DeBenedictis Action against Mr. Gaudio with prejudice (NYSCEF Doc. No. 12). In a decision and order of New York State Supreme Court Justice Marcy Friedman (NYSCEF Doc. No. 11), dated March 6, 2015, which granted Mr. Malta's motion for summary judgment in part, Justice Friedman expressly disclaimed any reliance on the Gaudio Affidavit because it was wholly conclusory and raised credibility issues that could not be resolved on the summary judgment motion (*id.*, at 10, fn 6). On January 19, 2018, Mr. Malta and Mr. DeBenedictis reached a settlement to resolve the claims in the DeBenedictis Action (NYSCEF Doc. No. 13).

Mr. Malta commenced this action on June 28, 2019 alleging that based on the Gaudio Affidavit proffered in the DeBenedictis Action, Mr. Gaudio's breached the Settlement Agreement's non-disparagement clause (NYSCEF Doc. No. 1; the **Complaint**).

Discussion

On a motion to dismiss, the pleadings are to be afforded a liberal construction and the facts as alleged in the complaint are accepted as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). Under CPLR § 3211 (a)(1), the court may dismiss a cause of action where the documentary evidence conclusively establishes a defense to the claims as a matter of law (*id.*, 88). Dismissal under CPLR § 3211 (a)(7) requires the court to assess whether the proponent of the pleading has a cause of action and not whether he has stated one (*id.*).

Mr. Gaudio argues that the Complaint should be dismissed because (i) judicial privilege bars any claim based on breach of the non-disparagement clause, (ii) there was no disparagement of Mr. Malta in contravention of the non-disparagement clause, and (iii) that this action is barred by General Obligations Law § 15-108.

A. Absolute Privilege Bars Mr. Malta's Claim

In his opposition papers, and relying on *Purple Eagle Entertainment, Inc. v Bray*, 2018 NY Slip Op 30538[U] [Sup Ct, NY County 2018], Mr. Malta argues that absolute privilege only applies to defamation claims, but does not apply to a claim that sounds in breach of contract concerning a non-disparagement clause. However, Mr. Malta's reliance is misplaced. *Purple Eagle Entertainment, Inc.* does not address the applicability of absolute privilege to breach of contract claims.

Absolute privilege immunizes a speaker or writer from liability for an otherwise defamatory statement to which the privilege applies, regardless of the motive underlying the statement (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 170 [1st Dept 2007]). An oral or written statement made during a judicial proceeding, which is material or pertinent to the litigation, is absolutely privileged (*Baratta v Hubbard*, 136 AD2d 467, 468 [1st Dept 1988] [citations omitted]). The First Department has held that the absolute witness privilege applies to a claim for breach of a non-disparagement clause (*Arts4All, Ltd. v Hancock*, 5 AD3d 106, 108 [1st Dept 2004]; *Wolberg v IAI N. Am., Inc.*, 161 AD3d 468, 469 [1st Dept 2018]). However, the privilege does not apply where “where the underlying lawsuit was a sham action brought solely to defame the defendant” (*Flomenhaft v Finkelstein*, 127 AD3d 634, 638 [1st Dept 2015]).

Here, Mr. Malta is suing Mr. Gaudio for statements made by Mr. Gaudio in the DeBenedictis Action. However, because the Gaudio Answer and the Gaudio Affidavit were relevant to Mr. Gaudio's defense and Mr. DeBenedictus' claims, Mr. Gaudio's statements in the DeBenedictis Action are pertinent communications that are subject to absolute privilege (*see Sexter & Warmflash, P.C.*, 38 AD3d at 173-174 [explaining that pertinence is a question of law that can be determined on a motion to dismiss and that the question of whether a statement is pertinent to the litigation is determined by an "extremely liberal" test]). This absolute privilege applies to shield Mr. Gaudio from Mr. Malta's purported claim for breach of the non-disparagement clause in the Settlement Agreement (*see Arts4All, Ltd.*, 5 AD3d at 108). The exception to absolute privilege for a sham action does not apply in this case because the DeBenedictis Action was not brought by Mr. Gaudio for the sole purpose of defaming Mr. Malta. Indeed, it was not brought by Mr. Gaudio at all. Accordingly, the Complaint is dismissed because absolute privilege immunizes Mr. Gaudio for any purported liability regarding statements he made during the DeBenedictis Action.

B. Mr. Malta Fails to State a Claim for Breach of the Non-Disparagement Clause

In addition, Mr. Gaudio's statement in the Affidavit was not negative, derogatory or disparaging. In his opposition papers, Mr. Malta alleges that Mr. Gaudio breached the non-disparagement clause because Mr. Gaudio stated that he believed Malta had advised Mr. DeBenedictis of the pending Second Avenue Group Sale and the Second Avenue Air Rights Sale after Malta and I had discussed them" (NYSCEF Doc. No. 4, ¶ 12).

Mr. Gaudio's statement simply is not about Mr. Malta's character or in any way disparaging to him personally. To the extent that Mr. Gaudio made allegedly inconsistent or false statements during the DeBenedictis Action, an inconsistent or false fact is not in itself disparagement. The heart of Mr. Malta's claim is that the statement by Mr. Gaudio is false and that Mr. DeBenedictis continued his litigation with Mr. Malta because Mr. DeBenedictis believed that Mr. Gaudio was telling the truth that Mr. Gaudio thought that Mr. Malta advised Mr. DeBenedictis about the pending future sales. This simply isn't actionable as a disparagement claim. If anything, it sounds in contribution as it relates to the responsibility to Mr. DeBenedictis.

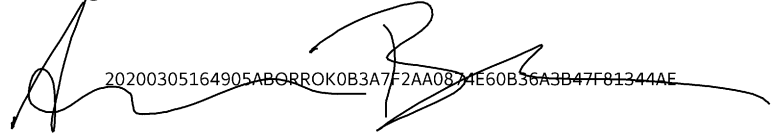
C. General Obligations Law § 15-108 Bars Mr. Malta's Claim

General Obligations Law § 15-108(c) provides that a "tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." (NY CLS Gen Oblig § 15-108). Due to Mr. Gaudio's statements in the DeBenedictis Action, Mr. Malta alleges that he was forced to settle the DeBenedictis Action for \$500,000 and release valuable third party claims against the third party defendant (NYSCEF Doc. No. 1, ¶¶ 15-16). Mr. Malta further alleges that he suffered damages of no less than \$1,500,000 (*id.*, ¶ 17).

Although Mr. Malta claims for breach of the Settlement Agreement, Mr. Malta's allegations essentially sound in contribution as against Mr. Gaudio. Allowing Mr. Malta to pursue Mr. Gaudio for damages arising out of the DeBenedictis Action would effectively permit Mr. Malta to circumvent GOL § 15-108 and pursue contribution from another tortfeasor upon one's own release. This is impermissible. Accordingly, the motion is granted and this case is dismissed.

Accordingly, it is

ORDERED that the defendant's motion to dismiss is granted.



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3/5/2020

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED DENIED

GRANTED IN PART OTHER

APPLICATION: SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT REFERENCE