Gotbetter v. Grinberg, 1356/08
Decided: July 29, 2008

Judge Arlene P. Bluth

NEW YORK COUNTY
Civil Court

Appearances:

Howard Gotbetter, plaintiff pro se

Kristine Grinberg, defendant pro se

Judge Bluth

DECISION/ORDER

Defendant's motion to dismiss this action is granted; her request for the impositions of sanctions, attorney's fees, costs and disbursements is denied.

In this small claims action, claimant, an attorney, claims that defendant, also an attorney, defamed him by implying in court papers that claimant was a "dead-beat judgment/debtor" while knowing that claimant "was in Bankruptcy in Chapter 7 at the time" (Gotbetter affirmation in opposition, p. 1).

Background facts

Defendant is an associate of the law firm that represented a petitioner in a non-primary residence summary holdover proceeding (L&T Index No. 74094/05) against claimant as tenant. After trial, petitioner was awarded a judgment of possession (and two money judgments). Claimant was lawfully evicted on October 25, 2007.

On appeal, the Appellate Term, First Department affirmed the trial court's order and judgment, and denied claimant's motion for reargument, leave to appeal to the Appellate Division and for a stay of eviction. The Appellate Division denied claimant's motion for leave to appeal and also declined to

stay his eviction - that order, however, contained a scrivener's error which incorrectly referred to petitioner as the moving party. Claimant then moved to reargue the Appellate Division's order based on that error. Despite the fact that less than two weeks after issuing that order, the Appellate Division issued a corrected order reaffirming the denial of claimant's motion for leave to appeal, the claimant refused to withdraw his reargument motion. Petitioner then cross-moved for sanctions. By order entered on December 27, 2007, the Appellate Division denied claimant's reargument motion and granted petitioner's cross-motion, imposing sanctions on both claimant and his attorney, each in the amount of $2,500.00. On January 28, 2008, claimant moved to reargue that portion of the order imposing sanctions.

The statements at issue were contained in an affirmation which defendant submitted to the Appellate Division, First Department in opposition to claimant's reargument motion. In her affirmation dated February 4, 2008 (exhibit 13 to the moving papers), defendant noted that claimant had not satisfied two money judgments (totaling $164,054.27) which two judges of the housing court had awarded to petitioner. In his reply affirmation, claimant's counsel advised the court that defendant failed to include the fact that claimant had filed for Chapter 7 bankruptcy relief in the United States Bankruptcy Court, and claimed that failure was "significant" (exhibit 14, Kravitz affirmation, para. 5). It is undisputed that claimant's debts were not discharged by the Bankruptcy Court until February 27, 2008, more than three weeks after defendant submitted her affirmation. Therefore, at the time defendant made the representation that there were two unsatisfied judgments against claimant, it was absolutely true.

On March 4, 2008, the Appellate Division denied claimant's reargument motion and upheld the sanctions imposed on claimant and his attorney in the total amount of $5,000. The instant claim for $5000 was filed on April 14, 2008.

Claimant asserts that defendant's statements in her February 4, 2008 affirmation regarding the money judgments against him, and her failure to include that he had filed for protection under the bankruptcy laws, constitute grounds for a claim for defamation. This Court disagrees.

Motion to dismiss

The Court notes that motion practice, other than to vacate defaults and for

discovery, is discouraged in small claims cases. This is understandable because in small claims, the litigants are usually self-represented and, although they may have a colorable claim, they may be ill-equipped to oppose a motion in writing. "The informality and convenience of small claims practice is necessarily frustrated by requiring pro se litigants to respond to formal motion practice under the CPLR prior to the hearing of their case." Williams v. Friedman Management Corp., 11 Misc 3d 139(A), 816 NYS2d 702 (App Term 1st Dept 2006) see also Sarver v. Pace University, 5 Misc 3d 70, 785 NYS2d 824 (App Term 1st Dept 2004). However, in the case at bar, because claimant is an experienced attorney (for more than fifty years) representing himself, the concern for protecting inexperienced lay litigants is inapplicable.

Indeed, there are cases when dismissal upon motion is appropriate even when the claimant is not an experienced attorney. One example is Clegg v. Bon Temps, Ltd. 114 Misc2d 805, 452 NYS2d 825 (Civ Ct, NY County 1982), where the claimant sued her former employer for defamation based upon its communications with the Department of Labor concerning her application for unemployment benefits. Holding that the communication was privileged and thus an absolute defense, Judge Saxe dismissed that claim. Another example of an appropriate grant of a motion to dismiss was in Loakman v. Transport Workers Union of Greater New York, AFL-CIO, Local 100, 11 Misc 3d 936, 938, 816 NYS2d 336 (Civil Ct, NY County 2006). There, the claimant sued the Transport Worker's Union because he missed time from work due to the union's strike. Judge Matos found that even if claimant proved the facts at trial, defendant still would have no liability for claimant's damages, that is, claimant simply did not have a case against the defendant as a matter of law.

Therefore, although the general rule disfavors granting motions to dismiss in small claims court, there are exceptions to that rule. Those are cases which, like here, "the defendant has raised a clear issue of law on its motion to dismiss [and] resolution of that issue serves, rather than impedes, notions of substantial justice." Clegg v. Bon Temps, Ltd., 114 Misc2d 805, 809, 452 NYS2d 825, 828 (Civ Ct, NY County 1982). In this case, substantial justice is served by granting the motion.

Truth is an absolute defense

When defendant wrote that there were two unsatisfied judgments against claimant, it was absolutely true. "Truth provides a complete defense to

defamation claims." Dillon v. City of New York, 261 AD2d 34, 39, 704 NYS2d 1, 6 (1st Dept 1999). Therefore, defendant's motion should be granted on this ground alone.

Defendant's words were absolutely privileged

To the extent that claimant alleges that defendant wrote only half the truth, that is, defendant should have written that claimant, a judgment debtor, had applied to the Bankruptcy Court but no resolution of his case has yet been made, this Court finds that defendant's written submission to the Appellate Division was absolutely privileged. The Appellate Division, First Department recently stated that "it is well-established that a statement made in the course of legal proceedings is absolutely privileged if it is at all pertinent to the litigation" Pomerance v. Mc Tiernan, 51 AD3d 526, 528, 859 NYS2d 44, 45-46 (1st Dept 2008) (statements made by an attorney about another attorney in an affidavit submitted to the court in support of a motion), citing Youmans v. Smith, 153 NY 214, 219 (1897); see also R.W.P. Group, Inc. v. Holzberg 202 AD2d 410, 608 NYS2d 504 (2d Dept 1994) (plaintiff's attorney stated in affidavit that defendant had "stolen" accounts belonging to plaintiff); Caplan v. Winslett 218 AD2d 148, 637 NYS2d 967 (1st Dept 1996) (defendant's attorney made statements about the other attorney's client outside the judge's presence after a conference). This privilege extends to judges, jurors, witnesses, parties and as relevant here, the parties' attorneys. See Park Knoll Assoc. v. Schmidt, 59 NY2d 205, 209, 464 NYS2d 424 (1983).

The absolute privilege is very broad. "Since there can be no dispute or question that the privilege embraces anything that may possibly be pertinent, it follows that a statement, made in open court in the course of a judicial proceeding, is absolutely privileged if, by any view or under any circumstances, it may be considered pertinent to the litigation. [internal quotations and citations omitted]" Martirano v. Frost, 25 NY2d 505, 507, 307 NYS2d 425, 426-427 (1969). The test for pertinence is "extremely liberal . . . the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices to establish the offending statement's pertinence to the litigation." Sexter & Warmflash, P.C., et. al., v. Margrabe, 38 AD3d 163, 173, 828 NYS2d 315 (1st Dept 2007). Indeed, ninety years ago, Judge Cardozo also found that when an advocate is advancing the client's case, the absolute privilege extends to anything that may possibly be pertinent: "There is no room in such matters for any strict or narrow test. Much must be left to the discretion of the advocate. The privilege embraces anything that may

possibly be pertinent." Andrews v. Gardiner, 224 NY 440, 445 (1918). Here, there is absolutely no question that defendant's statements were pertinent to the matter before the Appellate Division. The statement simply accurately recounted the procedural history and posture of the case before the Court.

That branch of defendant's motion seeking attorneys' fees is denied as defendant has not demonstrated a basis for any entitlement to such an award. Defendant's request for an order imposing sanctions and directing claimant to pay costs and disbursements is also denied. Costs and sanctions for frivolous conduct in civil litigation are not available "in proceedings in a small claims part of any court" (22 NYCRR 130-1.1[a]; see Spiegel v. Continental Airlines, 11 Misc 3d 145(A), 819 NYS2d 851 [App Term 2d Dept 2006]).

In summary, this action for defamation is barred because what defendant said was true. It is also barred because an advocate has an absolute privilege to speak about pertinent matters within judicial proceedings as a matter of law. As substantial justice is served by granting the motion, defendant's motion to dismiss on the ground that claimant has failed to state a cause of action is granted and the claim is dismissed with prejudice. Sanctions, costs and disbursements are denied.

This is the Decision and Order of the Court.