

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

----- X
MICHAEL J. KATZ, M.D. and MICHAEL J. KATZ
M.D. PC,

Index No.: 153581/2014

Plaintiffs,

-against-

**ATTORNEY AFFIDAVIT
SUBMITTED IN SUPPORT OF
TURKEWITZ'S PRE-
ANSWER MOTION TO
DISMISS**

LESTER SCHWAB KATZ & DWYER, LLP, PAUL L.
KASSNER, THE TURKEWITZ LAW FIRM, ERIC
TURKEWITZ, SAMSON FREUNDLICH, JOHN DOE No. 1
through JOHN DOE No. 10, and ABC CORP. No. 1 through
ABC CORP. No. 10

Defendants.

----- X
STATE OF NEW YORK)
) ss:
COUNTY OF NEW YORK)

MARK K. ANESH, an attorney duly admitted to practice law before the Courts of the State of New York, hereby admits the following to be true under the penalty of perjury:

1. I am a member of the law firm Lewis, Brisbois, Bisgaard & Smith LLP, counsel to defendants THE TURKEWITZ LAW FIRM and ERIC TURKEWITZ (collectively "Turkewitz"). As such, I am fully familiar with the facts and circumstances herein.

2. This Affidavit is submitted in support of Turkewitz's motion seeking an Order: (a) dismissing plaintiffs' verified complaint pursuant to CPLR §§ 3211(a)(1) and (7), for failing to state a valid cause of action as a matter of law; (b) sanctioning plaintiffs, pursuant to CPLR § 8303-a and 22 NYCRR 130-1.1, given the frivolous nature of the subject verified complaint and plaintiffs' frivolous conduct; (c) sanctioning plaintiffs for their improper *ad damnum* clause, as its request for specified compensatory damages is in violation of CPLR § 3017(c); and (d) together with such other and further relief as this Court deems just and proper.

3. This defamation action arises out of trial testimony given by plaintiff Michael J. Katz, M.D. (“Katz”) on April 12, 2013 as a medical expert in a judicial proceeding before Justice Duane Hart in Supreme Court, Queens County ¹(“underlying action”). Justice Hart made a number of critical comments about Katz during the underlying action, calling him a liar on at least 25 occasions. These comments are chronicled in both the plaintiffs’ subject verified complaint and the transcripts of the underlying trial and proceedings. Copies of the transcripts of the April 12, 2013 trial testimony and the subsequent hearings in the underlying action held on July 1, 2013 and July 8, 2013, are annexed hereto as Exhibits A, B, and C, respectively. Turkewitz reported on these court proceedings in a series of posts on his *New York Personal Injury Law Blog*. These blogs posts, which are annexed as Exhibits 1-5 of plaintiffs’ verified complaint, give rise to the instant suit. As summarized below, and as is set forth more fully in the accompanying Memorandum of Law, all of plaintiffs’ claims must be dismissed as a matter of law.

4. Upon information and belief, plaintiffs commenced this defamation action against Turkewitz and others on April 14, 2014 by the filing of a summons and verified complaint. A copy of the verified complaint with exhibits is annexed hereto as Exhibit D.

5. Plaintiffs allege that Turkewitz “maintains a popular internet blog called the New York Personal Injury Blog” (Exh. D, ¶ 141) which is “primarily intended to generate business and attract potential clients to the Turkewitz Law firm.” (Exh. D, ¶ 144).

6. The verified complaint alleges that Turkewitz has been named in this lawsuit for publishing a series of blog posts concerning the underlying proceedings before Justice Hart. (Exh. D, ¶ 145). It further alleges that Turkewitz “repeated the false accusations made by Justice Hart

¹ *Manual Bermejo v. Amsterdam & 76th Associates, et. al*, Queens County, Index No. 23985/09.

concerning Dr. Katz in his blog posts and otherwise made a portion of the transcripts of the proceedings available to the public at large.” (Exh. D, ¶ 146).

7. The verified complaint alleges that Turkewitz was not content to simply report on the proceedings, but instead made “gross misrepresentations and false statements of facts concerning the proceeding in an effort to destroy Katz’s career.” (Exh. D, ¶ 147).

8. The alleged “gross misrepresentations and false statements” set forth in plaintiffs’ verified complaint are numerable and can be broken down into the following general categories: (1) Katz lying in the underlying action (Exh. D, ¶¶ 155, 158, 159, 165, 177, 179); (2) the implication that Katz was charged with or found guilty of committing a crime by providing untruthful testimony in the underlying action (Exh. D, ¶¶ 148, 150, 153, 159, 165, 171, 173, 174, 179); (3) Justice Hart sending copies of Katz’s testimony in the underlying action to the Queens District Attorney, the Administrative Judge of Queens County and the Office of Professional Medical Conduct, so that they might investigate Katz (Exh. D, ¶¶ 149, 163, 164, 166, 167, 175, 176, 180, 182); (4) the length of the March, 2013 medical examination conducted by Katz according to Katz’s testimony versus the length depicted in the video (Exh. D, ¶¶ 157, 158, 172, 177); (5) the potential fallout from Justice Hart’s finding that Katz lied under oath in the underlying action. (Exh. D, ¶¶ 161, 170, 163, 168, 169, 170).

9. As for the damages allegedly sustained as a result of Turkewitz’s blog posts, the verified complaint alleges that Katz had a “long and successful career” (Exh. D, ¶ 11) which was “destroyed overnight by an overzealous state court judge and the defendants in this action.” *Id.* Specifically, the verified complaint alleges that Katz has been informed “time and time again by insurance companies and third party independent medical examination companies that they can no longer use him as an expert witness” because of the Turkewitz blog. (Exh. D, ¶ 39). Plaintiffs allege that “Dr.

Katz has been repudiated, ostracized and completely shut out of the insurance defense industry directly as a result of defendants' improper and unlawful conduct." (Aff., Exh. D ¶ 40).

10. As a result of these purported misrepresentations and false statements of fact, plaintiffs' assert five causes of action against Turkewitz purporting to sound in defamation, injurious falsehood, tortious interference with contract, tortious interference with business advantage, and prima facie tort. (Exh. D).

11. Plaintiffs' defamation claim alleges that Turkewitz knowingly made numerous false and misleading statements about Katz for the sole purpose of defaming and otherwise damaging Katz and that these statements constituted libel per se because they tended to injure Katz in his profession and/or created the impression that Katz was charged with or convicted of a crime. (Exh. D, ¶¶ 242-248).

12. Plaintiffs' cause of action sounding in injurious falsehood avers that Turkewitz maliciously published numerous falsehoods concerning Katz with the intent to create a false impression regarding Katz's reputation resulting in injury to Katz's reputation and business. (Exh. D, ¶¶ 264-268).

13. Plaintiffs' cause of action purporting to sound in tortious interference with contract alleges that Turkewitz was aware that plaintiffs had contractual relationships with insurance carriers and third party independent medical companies and that several such carriers and companies terminated and/or suspended their contractual relationships with plaintiffs based upon Turkewitz's false and misleading statements. (Exh. D, ¶¶ 282-285).

14. Plaintiffs' cause of action sounding in tortious interference with business advantage avers that Turkewitz was aware that plaintiffs had substantial business relationships with insurance carriers and third party independent medical companies; that Turkewitz knowingly and intentionally

interfered with such relationships solely out of malice, causing injury to the relationships. (Exh. D, ¶¶ 304-307).

15. Plaintiffs' prima facie tort claim alleges that Turkewitz intentionally inflicted harm on plaintiffs by maliciously publishing defamatory statements about Katz with the intent to destroy Katz's career as a defense witness. Plaintiffs allege that as a direct result of Turkewitz's conduct; Katz's lucrative career as an expert witness has been destroyed, resulting in special damages. (Exh. D, ¶¶ 322-326).

16. As is set forth more fully in the accompanying Memorandum of Law, plaintiffs' verified complaint fails to state one single valid cause of action against Turkewitz and is refuted by the documentary evidence, requiring its dismissal pursuant to CPLR §§ 3211(a)(1) and (7).

17. First, all of plaintiffs' claims must be dismissed as a matter of law, since they are based upon fair and true reports of statements actually made by Justice Hart in open court during the underlying action, and conceded by the plaintiffs, and are thus protected by New York's statutory fair report privilege. *See* the accompanying Memorandum of Law, Point I.

18. Second, the Court should also find that the claims should be dismissed for failing to state a valid cause of action as a matter of law. *See* the accompanying Memorandum of Law, Points II-VI.

19. Dismissal of plaintiffs' defamation claim is warranted, as a number of the purportedly defamatory statements contained within the blog posts are mere opinion and are therefore not actionable as a matter of law. *See* the accompanying Memorandum of Law, Point II.

20. Plaintiffs' injurious falsehood claim must likewise, be dismissed, as the transcripts of the underlying trial and hearings, and the admissions in Katz's verified complaint, demonstrate that the allegedly false statements are actually true, as Justice Hart did, in fact, call Katz a liar. This claim

further fails on the ground that plaintiffs have not pled facts tending to show that the purportedly defamatory statements contained within the blog posts spoke to the quality of Katz's medical services or that plaintiffs have sustained special damages in the form of lost earnings. *See* the accompanying Memorandum of Law, Point III.

21. Plaintiffs' tortious interference with contract cause of action must also be dismissed, as the verified complaint fails to allege that Turkewitz intentionally procured the insurance carriers and third party independent medical brokers' breach of contract without justification, or that there was an actual breach of contract. *See* the accompanying Memorandum of Law, Point IV.

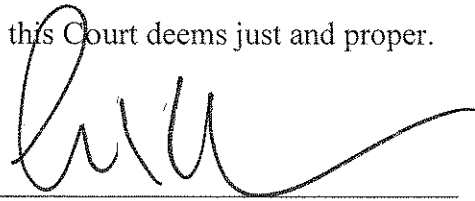
22. As for plaintiffs' tortious interference with economic advantage claim, dismissal is required since the verified complaint is devoid of any facts tending to show that Turkewitz's blog posts were directed at insurance carriers or third party independent medical brokers. *See* the accompanying Memorandum of Law, Point V.

23. Plaintiffs' claim purporting to sound in prima facie tort neither alleges special damages nor that Turkewitz's sole motivation in writing the blog posts was disinterested malevolence. Moreover, plaintiffs are incorrectly using prima facie tort as an alternative to their defamation claim, requiring dismissal of this cause of action as well. *See* the accompanying Memorandum of Law, Point VI.

24. Furthermore, since plaintiffs have asserted five patently frivolous claims seeking an outrageous amount of specified punitive and compensatory damages in direct violation of CPLR § 3017(c)'s prohibition on stating such amounts, Turkewitz requests an Order that not only dismisses the verified complaint, but also sanctions plaintiffs for the reasonable expenses, including the costs, disbursements and attorney's fees incurred in defending this suit, pursuant to CPLR § 8303-a and 22 NYCRR 130-1.1. *See* the accompanying Memorandum of Law, Point VII.

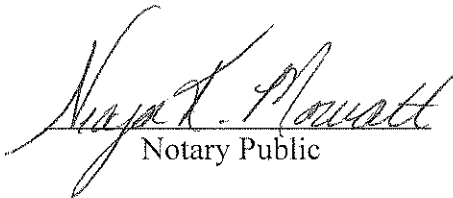
25. Pursuant to the foregoing, and as set forth more fully in the accompanying Memorandum of Law, plaintiffs' verified complaint as asserted against Turkewitz should be dismissed in its entirety pursuant to CPLR §§ 3211(a)(1) and (7) and plaintiffs should be sanctioned pursuant to CPLR § 8303-a and 22 NYCRR 130-1.1 for commencing this frivolous action and seeking a specified amount of punitive and compensatory damages.

WHEREFORE, it is respectfully requested that this Court grant the motion of defendants THE TURKEWITZ LAW FIRM and ERIC TURKEWITZ dismissing the verified complaint as asserted against them in its entirety, and sanctioning the plaintiffs for their frivolous and improper conduct, together with such other and further relief as this Court deems just and proper.



MARK K. ANESH

Sworn to before me this
16th day of July, 2014



Nijak K. Mowatt
Notary Public

