

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

PRESENT: BERNARD J. FRIED
Justice

PART 60

FBEM

Aaron Brett Charney,

Plaintiff,

- v -

Sullivan & Cromwell, LLP,

Defendant.

INDEX NO. 100625/2007

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

SEP 28 2007

NEW YORK
COUNTY CLERK'S OFFICE

This motion has been decided in accordance with the accompanying memorandum decision.

Dated: 9/27/07



J.S.C.

HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

FBEM

----- X
AARON BRETT CHARNEY,

Plaintiff,

- against -

Index No. 100625/2007

SULLIVAN & CROMWELL LLP,

Defendant.
----- X

APPEARANCES:

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FILED
SEP 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

FRIED, J.:

Defendant Sullivan & Cromwell LLP ("S&C") has filed a motion to dismiss two causes of action in plaintiff Aaron Brett Charney's amended complaint ("complaint") pursuant to CPLR § 3211(a)(7): intentional infliction of emotional distress and civil conspiracy to violate the New York City Human Rights Law ("HRL"), Administrative Code §§ 8-101 – 8-703. S&C also asks me to

strike factual allegations concerning actions after Charney filed his initial complaint as irrelevant under CPLR § 3024(b).

It is well-known that, “[o]n a pre-answer motion to dismiss brought pursuant to CPLR 3211(a)(7), the complaint must be liberally construed, the allegations therein taken as true, and all reasonable inferences must be resolved in plaintiff’s favor.” *Gorelik v. Mount Sinai Hosp. Center*, 19 A.D.3d 319, 319 (1st Dept. 2005). The motion must be denied if, from the pleading’s four corners, “factual allegations are discerned which taken together manifest any cause of action cognizable at law.” *Id.* (quoting *Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 54 (2001)).

With respect to the third cause of action: Defendant does not assert that plaintiff has not stated a cause of action for intentional infliction of emotional distress. Rather, defendant contends that the First Department does not permit this cause of action to be asserted if the complaint also alleges HRL causes of action that seek damages for emotional distress based on the same conduct.

The tort of intentional infliction of emotional distress was created as a last-ditch avenue for injured plaintiffs to recover damages, when traditional theories of recovery did not offer relief, and an injustice would otherwise be done. An oft-cited example of a result reached under the traditional common law is *Mitchell v. Rochester Ry.*, 151 N.Y. 107 (1896), in which a pregnant woman who fainted and miscarried after nearly being run over by carriage horses was found by the court not to have a cause of action, because her injuries, while severe, were “occasioned by fright, as there was no immediate personal injury.” *Mitchell*, 151 N.Y. at 109. This result is no longer compelled by New York law. *Battalla v. State*, 10 N.Y.2d 237, 239-42 (1961) (overruling *Mitchell*).

The Court of Appeals in *Howell v. New York Post Co.*, 81 N.Y.2d 115 (1993), describing the scope of the tort for intentional infliction of emotional distress, noted that it “may overlap other areas

of the law” by creating “liability for conduct that is otherwise lawful.” *Howell*, 81 N.Y.2d at 122. It is important to understand what *Howell* meant by “overlap”: it did *not* say that the tort provides duplicative liability where another cause of action already provides relief for certain conduct. Rather, it said that the tort would create *new liability* for conduct that would have been lawful under the common law, in cases in which the common law would have led to an unjust result.

Intentional infliction of emotional distress as a theory of recovery “is to be invoked only as a last resort” in such cases. *McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc.*, 256 A.D.2d 269, 270 (1st Dept. 1998). In *McIntyre*, the First Department rejected a multi-million-dollar verdict in a sexual harassment case, where the jury had awarded compensatory and punitive damages separately for intentional infliction of emotional distress and for harassment and retaliatory discharge under the New York City Administrative Code. The court reasoned that “emotional damages are [already] available under the theories of sexual harassment and retaliatory discharge” under the HRL, and that permitting the plaintiff to recover additional damages for intentional infliction of emotional distress would permit a double recovery. *McIntyre*, 256 A.D.2d at 270.

The First Department took this principle even further in *Conde v. Yeshiva University*, 16 A.D.3d 185 (1st Dept. 2005). Whereas *McIntyre* had refused to permit a plaintiff to recover at trial duplicative damages for the same emotional injury, the *Conde* court did not permit a plaintiff’s potentially duplicative claim for intentional infliction of emotional distress to survive the pleading stage, reasoning that the plaintiff’s “remedy for damages has been preserved in the surviving statutory claims for sexual harassment and retaliation.”¹ *Conde*, 16 A.D.3d at 187.

1

In *164 Mulberry Street Corp. v. Columbia University*, however, the First Department made it clear that the intentional infliction of emotional distress tort *would* survive the pleading stage in

Charney concedes that he may not recover duplicative damages for emotional injuries, but he maintains that he is entitled to plead alternative causes of action, and that it would be premature to strike his tort claim at the pleading stage based on the speculative possibility of duplicative recovery at trial. At first glance, plaintiff's argument finds support in the CPLR's provision that "[c]auses of action or defenses may be stated alternatively or hypothetically." CPLR § 3014.

Plaintiff's argument, however, runs afoul of *Conde*. The first two causes of action in the complaint allege sexual orientation discrimination and retaliation under §§ 8-107(1)(a) and (7) of the HRL. The decisions in *McIntyre* and *Conde* both rested on underlying findings by the First Department that prevailing plaintiffs are able to recover damages for their emotional injuries based on discrimination and retaliation under the HRL. Since Charney's HRL causes of action have not been dismissed, *Conde* requires me to dismiss the third cause of action for intentional infliction of emotional distress as potentially duplicative of the surviving statutory claims for discrimination and retaliation under the HRL.

Defendant has also moved to dismiss plaintiff's fourth cause of action, entitled "conspiracy to violate the City Human Rights Law." In that cause of action, plaintiff alleges that S&C conspired with Edward R. Gallion, who is a former S&C associate and a former attorney for Gera Grinberg, an alleged witness to some of the complaint's allegations. Some of Gallion's alleged conduct in furtherance of this conspiracy include: (1) threatening Grinberg with deportation to Canada; (2) threatening Charney that he would be crushed if he pursued his lawsuit and invoking S&C's previous

a complaint that pled potentially duplicative tort causes of action, if the latter causes of action did not survive the pleading stage. 4 A.D.3d 49, 58 (1st Dept. 2004) (refusing to dismiss intentional infliction of emotional distress causes of action as duplicative of libel and libel per se claims, where the latter claims had been dismissed on other grounds).

representation of Nazis; (3) destroying notes taken by Grinberg, which were allegedly the only contemporaneous record of certain allegations in plaintiff's case; and (4) advising Grinberg that it was in his best interest for Gallion to cooperate with S&C in creating a false affidavit suggesting that Charney had wrongfully destroyed evidence. Plaintiff has pled conspiracy because he would like S&C to be held liable for the actions and statements of Gallion. (Trans. at 17-18.)

“There is no substantive tort of conspiracy” under New York law. *SRW Assocs. v. Bellport Beach Prop. Owners*, 129 A.D.2d 328, 332-33 (2d Dept. 1987). “Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort.” *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). “[O]rdinarily, a charge of conspiracy, in and of itself, does not give ground for civil relief, unless followed by allegations of overt acts, and resulting injury.” *Keller v. Levy*, 265 A.D. 723, 724 (1st Dept. 1943). Consequently, “[w]hile there is no cognizable action for a civil conspiracy, a plaintiff may plead conspiracy in order to connect the actions of the individual defendants with an actionable underlying tort and establish that those acts flow from a common scheme or plan.” *American Preferred Prescription, Inc. v. Health Mgmt., Inc.*, 252 A.D.2d 414, 416 (1st Dept. 1998).

An allegation of conspiracy is useful in order to “render all defendants liable for each other’s acts in furtherance thereof, and thus broaden liability.” *Keller*, 265 A.D. at 724 (reversing dismissal of cause of action for conspiracy to commit fraud). The allegation and proof of a conspiracy “is only important to connect a defendant with the transaction and to charge him with the acts and declarations of his co-conspirators, where otherwise he could not have been implicated.” *Brackett v. Griswold*, 112 N.Y. 454, 466-67 (1889).

In order to survive a motion to dismiss a conspiracy cause of action, a plaintiff must

sufficiently “allege an actionable underlying tort.” *American Preferred*, 252 A.D.2d at 416 (dismissing conspiracy claim, where plaintiff “failed to sufficiently allege an actionable underlying” cause of action for tortious interference); *see also SRW Assocs.*, 129 A.D.2d at 332-33 (dismissing cause of action for conspiracy in the absence of an underlying actionable injury).

Here, the fourth cause of action cannot survive defendant’s motion to dismiss, because I have found no authority – and plaintiff has offered none – suggesting that New York recognizes a conspiracy to violate a civil rights enactment. On the contrary, New York courts permit allegations of conspiracy “only to connect the actions of separate defendants with an otherwise actionable tort.” *Alexander*, 68 N.Y.2d at 969. “There is no tort of civil conspiracy in and of itself absent the pleading of specific wrongful acts constituting independent *torts*.” *See Riverbank Realty Co. v. Koffman*, 179 A.D.2d 542, 543 (1st Dept. 1992) (emphasis added).² In light of my dismissal of the third cause of action, there is no longer any underlying *tort* cause of action in the complaint, to which the conspiracy cause of action could be connected. Under these circumstances, New York law does not recognize a cause of action for conspiracy. Because of this conclusion, I do not need to reach any of defendant’s other arguments in support of dismissing the conspiracy count, such as whether or not plaintiff’s allegations with respect to Gallion relate to Charney’s discrimination and retaliation claims.

Finally, defendant S&C asks me to strike paragraphs 142–175 and 179–204 from the

2

The rule that allegations of civil conspiracy are permitted only to link the actions of joint tortfeasors appears to have gone unchallenged by New York courts during the last 60 years, apart from a single aberration. *See Munzer v. Blaisdell*, 183 Misc. 777, 778 (Sup. Ct. N.Y. County 1944), *aff’d as mod. on other grounds*, 269 A.D. 970 (1st Dept. 1945) (holding that defendant could be liable for acts of co-defendant in furtherance of conspiracy to divulge contents of plaintiff’s case record in violation of Mental Hygiene Law).

complaint, on the ground that they contain irrelevant, scandalous, and prejudicial allegations. Plaintiff generally opposes defendant's request that I strike these paragraphs.

In reviewing a motion pursuant to CPLR § 3024(b), "the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." *Soumayah v. Minnelli*, 41 A.D.3d 390, 839 N.Y.S.2d 79, 82 (1st Dept. June 28, 2007). "A motion to strike scandalous or prejudicial material from a pleading [] will be denied if the allegations are relevant to a cause of action." *N.Y. City Health & Hosps. Corp. v. St. Barnabas Cmty. Health Plan*, 22 A.D.3d 391, 391 (1st Dept. 2005) (refusing to dismiss paragraphs that were relevant to counterclaims from pleading). But courts will strike matter that is unnecessary to state a claim, if it is prejudicial or scandalous, and if it shows limited potential for relevance. *See Schachter v. Mass. Protective Ass'n*, 30 A.D.2d 540, 540 (2d Dept. 1968) (striking from complaint "evidentiary matter" that appeared to be unnecessary for the complaint's sufficiency, to be prejudicial, and to "show little potentiality for relevancy, competency or admissibility at the trial") "Scandalous matter is that which is both immaterial and reproachful." *Hurley v. Hurley*, 266 A.D. 701, 701 (3d Dept. 1943).

Applying this law: I conclude that the allegations in the disputed paragraphs are potentially relevant to the retaliation claim and also serve to put defendant on notice of plaintiff's intent to bring post-termination conduct into this lawsuit. This potential for relevance is enough to survive a § 3024(b) motion. While no one likes to be sued, the allegations are not of such a scandalous or prejudicial nature as to warrant being stricken pursuant to CPLR § 3024(b). I do not make any final determination as to the relevance or admissability of this material for summary judgment or at trial. *Cf. Schachter*, 30 A.D.2d at 540 (striking from complaint "evidentiary matter" that appeared not to be relevant, but "mak[ing] no determination as to the relevancy or irrelevancy of such evidentiary

matter at the trial”). Consequently, I will not exercise my discretion to strike these paragraphs from the complaint.

In a footnote, S&C asks me to strike paragraphs 181 and 182 for the additional reason that they quote from the transcript of Gera Grinberg’s deposition, in disregard of my direction in open Court on April 12, 2007 to limit the disclosure of this deposition to attorneys and clients only, until further application be made to this Court. (Trans. at 87-88 (Apr. 12, 2007).) Plaintiff has not made such an application; indeed, he has not even responded to defendant’s request in this regard. Consequently, I will strike paragraphs 181 and 182 from the complaint.

Accordingly, it is

ORDERED that defendant’s motion to dismiss the third and fourth causes of action of the amended complaint is granted; and it is further

ORDERED that the third cause of action for intentional infliction of emotional distress is dismissed without prejudice; and it is further

ORDERED that the fourth cause of action for conspiracy is dismissed without prejudice; and it is further

ORDERED that paragraphs 181 and 182 are stricken from the amended complaint; and it is further

ORDERED that plaintiff may serve and file a second amended complaint in accordance with this Order within twenty (20) days of service of a copy of this order with notice of entry.

Dated: September 27, 2007

FILED
SEP 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

ENTER:



J.S.C.

HON. BERNARD J. FRIED