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| Wicked Entertainment, Inc. v Burbacki |
| 2019 NY Slip Op 30329(U) |
| February 13, 2019 |
| Supreme Court, New York County |
| Docket Number: 652352/2018 |
| Judge: Andrew Borrok |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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INDEX NO. 652352/2018

WIKKED ENTERTAINMENT, INC., STELLA STOLPER

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

ZARINA BURBACKI, YONATAN SHIMRONY,

Defendant.

DECISION AND ORDER

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Upon the foregoing documents and for the reasons indicated on the record (2/13/19 A. Armstrong, Ct. Reporter) and as otherwise set forth below:

1. The motion to dismiss the first cause of action (conversion) is denied. The allegations set forth in the complaint are that two conversions took place. One conversion relates to \$125,000. No credible dispositive documentary evidence is offered to refute this allegation and the complaint otherwise states a cause of action. The second involves \$150,000 which was later allegedly removed from the account. The facts alleged are that \$500,000 was in the escrow account. Ms. Burbacki returned \$350,000 and withheld or distributed \$150,000 to another party without permission. The documentary evidence submitted demonstrates that Ms. Burbacki reported that there was only \$350,000 in the account and that such amount had, in fact, been transferred. No bank statements, flow of funds or other evidence has been provided to utterly refute the claim for the conversion of \$150,000. To the extent that an email is produced from Ms. Stolper to Rosemary Mathawossian where Ms. Stolper says that this is all that it left in the account, it is insufficient to refute the claim. It may be that Ms. Stolper is indicating that this is all that is left in the account because Ms. Burbacki has absconded or converted \$150,000.

2. The motion to dismiss the second cause of action (tortious interference) is granted without prejudice. Tortious interference requires (1) a business relationship with a 3rd party, (2) the defendant knew of the relationship with intentional interference, (3) the defendant acted out of malice or used improper means that amount to a crime or an independent tort and (4) the defendant caused

injury. *Amaranth LLC v JP Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009).

Where tortious interference is based on a defamatory statement, pleading in accordance with CPLR 3016 is required. To wit, it is necessary to allege the time, place and manner of the false statement and to whom it was made. *Dillon v City of NY*, 261 AD2d 34, 38 (1st Dept 1999). The complaint contains mere general allegations, and most significantly, does not properly identify the business relationship or otherwise allege to whom it was made.

3. The motion to dismiss the third cause of action (breach of duty, based on the conversion) is denied at this stage of the pleading given the alleged attorney/client relationship.

4. The motion to dismiss the fourth cause of action (breach of duty, based on business opportunity) is granted without prejudice as there simply are insufficient facts to make out a breach of duty as it relates to business opportunities.

5. The motion to dismiss the fifth cause of action (unjust enrichment) is granted. This is duplicative of the first cause of action.

6. The motion to dismiss the sixth cause of action (defamation) is granted without prejudice. There are insufficient facts plead to make out a claim of defamation, given the heightened pleading requirements of CPLR 3016 (i.e., among other deficiencies, no one is specifically identified as having heard or been affected by the alleged defamatory statement).

7. The motion to dismiss the seventh cause of action (violation of 18 USC 2701) is granted. It is clear from the documentary evidence that Ms. Stolper granted unfettered access to her email account and asked Ms. Burbecki to do searches for certain information for her and asked them to change the password. In addition, the complaint does not sufficiently allege damages.

8. The motion to dismiss the eighth cause of action (Cal. Penal Code 630) is granted without prejudice. Among other deficiencies, the complaint simply does not allege that any conduct took place in California (i.e., the complaint refers to a call in Connecticut) and no authority is offered for the proposition that a violation of the California penal law may be brought as a cause of action in a New York state court action.

9. The motion to dismiss the common law claim of invasion of privacy is granted. Nothing in the complaint indicates that California law should govern this case and in New York this claim is not recognized. *Messenger v Gruner+Jahr Printing & Publ'g*, 94 NY2d 436 (2000).

10. The motion to dismiss the tenth cause of action (accounting) is denied as there is an issue as to the amount of money that was in the client trust account.

11. The motion to dismiss the eleventh cause of action (malpractice) is denied at this stage of the pleading because, among other things, of the allegations regarding the unauthorized withdrawals from the client escrow account and the potential handling of matters beyond her level of expertise without appropriate engagement of co-counsel and/or consultation with attorneys with specific expertise.

12. Insofar as the defendants moved to have the complaint dismissed with respect to Wikked, the motion is granted without prejudice as none of the allegations appear to relate to Wikked.

13. For the avoidance of doubt, as none of the allegations appear to relate to Mr. Shimrony other than a conclusory allegation that he "aided and abetted" certain causes of action which were otherwise dismissed above, the action is dismissed without prejudice as against Mr. Shimrony.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the second, fourth, fifth, sixth, seventh, eighth and ninth causes of action are dismissed; and it is further

ORDERED that accordingly the complaint is dismissed in its entirety as against Yonotan Shimrony with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant; and it is further

ORDERED that the remaining defendant is directed to serve an answer to the complaint within **20 days after service of a copy of this order with notice of entry**; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption as follows:

Stella Stolper,
Plaintiff,
-against-
Zarina Burbacki,
Defendant.

and it is further,

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address www.nycourts.gov/supctmanh).

Preliminary Conference: March 11, 2019 at 11:30 am.



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2/13/2019
DATE

ANDREW BORROK, J.S.C.

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| CHECK ONE: | <input type="checkbox"/> | CASE DISPOSED | <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| | <input type="checkbox"/> | GRANTED | <input type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> |
| | | | <input type="checkbox"/> | DENIED | |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> |
| | | | | | <input type="checkbox"/> |
| | | | | | REFERENCE |