

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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FERDOUS KHANDKER, M.D.,
Plaintiff,

Index No.:
708671/2020

-against-

Motion Date:
June 22, 2021

HANIAM MARIA, ABIDA BEGUM and
VAILA SALINA,

Motion Seq. No.:004

Defendants

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The following papers were read on this motion by plaintiff for an order granting a stay in the instant proceedings until the Office of Professional Medical Conduct matter has concluded, and a cross-motion by defendants for an order pursuant to CPLR §3126, precluding the introduction of evidence at trial by plaintiff and/or dismissing plaintiff's claims pursuant to NY Civil Rights Law 70-a and CPLR 3212(h), or in the alternative, pursuant to CPLR §3212, dismissing plaintiff's claims and issuing judgment in favor of defendants; pursuant to NY Civil Rights law 70-a, scheduling a hearing to determine the amount of compensatory damages, punitive damages, and attorney's fees, owed by plaintiff to defendants; pursuant to 22NYCRR 130.1., awarding fees and sanctions against plaintiff.

	Papers
	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits.....	E37-39
Notice of Cross-Motion, Affirmation, Exhibits.....	E40-67
Reply Affirmation.....	E70
Reply Affirmation.....	E71

The Court, sua sponte, recalls the decision and order dated July 23, 2021, and substitutes the following in its place and stead:

Upon the foregoing papers, it is ordered that plaintiff's motion and defendants cross-motion are determined as follows:

Plaintiff brings this action against defendants HANIAM MARIA, ABIDA BEGUM and VAILA SALINA to recover for alleged defamation, tortious interference with contractual relations, and prima facie tort stemming from social media posts authored by defendants on Facebook, Instagram, and Change.org. Plaintiff contends the social media posts authored by defendants constitute a "...systemic pattern of online harassment and defamation against plaintiff...containing false allegations that plaintiff had sexually assaulted defendant HANIAM MARIA.

The motion by plaintiff is seeking a stay pursuant to CPLR §2201 pending the outcome of an investigation into plaintiff's conduct by the Office of Professional Medical Conduct (hereinafter "OPMC"), as plaintiff contends the investigation by the OPMC can be referred for criminal prosecution.

Defendants, in opposition to plaintiff's motion, aver that plaintiff is not entitled to a stay as plaintiff is not a party to a criminal proceeding, and plaintiff has failed to demonstrate prejudice absent a stay.

Pursuant to CPLR §2201, "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms as may be just." A "court may exercise its discretion to stay proceedings in a civil action until a related criminal dispute is resolved" (*Desiervi v. Liverzani*, 136 AD 2d, 527 (2d Dep't 1988)). In considering whether to stay an action, a Court generally weighs the prejudice to the parties (*Matter of Astor*, 62 AD 3d 867 (2d Dept. 2009)).

Plaintiff's contention that he is entitled to a stay as the pending investigation by the OPMC can be "referred for criminal prosecution" is unavailing as plaintiff concedes the OPMC investigation is not a criminal proceeding. Moreover, plaintiff's case law, *Heifertz v. Metropolitan Jewish Geriatric Center*, 135 A.D. 2d 49 (N.Y. App. Div. 2d Dep't 1987), *Rodriguez v. South Bronx Dev. Organization*, 179 A.D. 2d 545 (N.Y. App. Div 1st Dep't 1992), and *Hunter v. Hunter*, 10 A.D. 2d 937 (N.Y. App. Div 1st Dep't 1960) is inapplicable and distinguishable. The *Heifertz* and *Rodriguez* cases both involve defendants seeking a stay of a civil action pending a workers compensation proceeding, while the *Hunter* case is a pure matrimonial action. Here, the litigant seeking a stay is the plaintiff in a civil action where no criminal proceeding is pending.

As such, the motion by plaintiff seeking a stay of this action pursuant to CPLR §2201 is denied.

Turning to the first branch of defendants' cross-motion seeking, pursuant to CPLR §3126, to preclude the introduction of evidence at trial by plaintiff, "Before a court invokes the drastic remedy of striking a pleading or the alternative remedy of precluding evidence, there must be a clear showing that the failure to comply with court-ordered discovery was willful and contumacious" (*Harris v City of New York*, 117 AD3d 790, 790 [2d Dept 2014]). Willfulness and contumaciousness can be inferred from "repeated failures to comply with the court's orders, as well as the absence of any explanation offered to excuse . . . failures to comply" (*Sowerby v Camarda*, 20 AD3d 411 [2d Dept 2005]).

Defendants' failed to establish that plaintiff acted willfully and contumaciously in plaintiff's failure to comply with discovery.

Accordingly, the branch of defendants cross-motion seeking to preclude evidence pursuant to CPLR §3126, is denied.

With respect to the second branch of defendants cross-motion seeking summary judgment pursuant to CPLR §3212(h), CPLR §3212(h) applies to a narrow class of lawsuits defined as, "strategic lawsuits against public participation (SLAPP)" (see *Inti. Shoppes v. At the Airport*, 131 A.D. 3d 926 (2d Dept. 2015)).

A motion seeking relief pursuant to CPLR §3212(h) requires, "the moving party to demonstrate that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a (NYCRL §76-a) of the civil rights law." Such motion made pursuant to CPLR §3212(h), "shall be granted unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification or reversal of existing law" (CPLR §3212(h)).

Pursuant to NYCRL §76-a(1), "an action involving public petition and participation is a claim based on any communication in a place open to the public, or a public forum in connection with an issue of public interest." Public interest, "shall be construed broadly, and shall mean any subject other than a purely private matter" (NYCRL §76-a(1)).

Defendants' Facebook, Instagram, and Change.Org social media posts at issue satisfy the elements of NYCRL §76-a(1). The posts

involve an issue of public interest, namely, plaintiff's actions as a physician, and plaintiff's actions as part of the Bengali community in Queens. Further, the posts are located on social media, a place open to the public.

As defendants have established in their cross-motion their prima facie entitlement to summary judgment pursuant to CPLR §3212(h), the burden shifts to plaintiff, who must demonstrate that the action "has a substantial basis in fact and law...".

Plaintiff, in opposition to the branch of defendants cross-motion seeking summary judgment pursuant to CPLR 3212(h), failed to satisfy its burden, as plaintiff merely submits an attorney affirmation with no supporting affidavit from plaintiff.

Accordingly, the branch of defendants cross-motion seeking summary judgment pursuant to CPLR §3212(h) is granted, and the action is hereby dismissed.

With respect to the branch of defendants cross-motion seeking a hearing to determine the amount of compensatory damages, punitive damages, and attorney's fees pursuant to NYCRL §70-a(1), " costs and attorneys fees shall be recovered upon a demonstration including an adjudication pursuant to...subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules..."

As such, the branch of defendants cross-motion seeking a hearing to determine the amount of compensatory damages, punitive damages, and attorney's fees, is granted, solely to the extent that, defendants shall recover the costs and attorneys fees incurred in accordance with NYCRL §70-a(1).

With respect to the branch of defendants cross-motion seeking sanctions pursuant to 22NYCRR 130.1., Part 130 permits a court to award costs, including reasonable attorney's fees, and financial sanctions for frivolous conduct (22 NYCRR 130-1.1 [a]). Conduct is frivolous when "it is undertaken primarily to delay or prolong the resolution of the litigation" or "it asserts material factual statements that are false" (22 NYCRR 130-1.1 [c] [2], [3]).

The court must also consider "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party" (22 NYCRR 130-1.1). Part 130 permits the imposition of sanctions only against "an attorney or a party to the litigation or against both" (22 NYCRR 130-1.1 [b]). "Statutes

authorizing an award of costs and sanctions are in derogation of common law and, therefore must be strictly construed" (*Saastomoinen v Pagano*, 278 AD2d 218, 218 [2d Dept 2000]).

Defendants contend sanctions against plaintiff pursuant to 22 NYCRR 130-1.1 are appropriate as plaintiff brought this action solely to harass and besmirch the defendants. Plaintiff contends sanctions are inappropriate pursuant to 22 NYCRR 130-1.1 as plaintiff contends he is solely attempting to litigate his claims.

As "statutes authorizing an award of costs and sanctions are in derogation of common law and, therefore must be strictly construed" (*Saastomoinen v Pagano*, 278 AD2d 218, 218 [2d Dept 2000]), the branch of defendants cross-motion seeking sanctions pursuant to 22 NYCRR 130-1.1 is denied.

This constitutes the Decision and Order of the court.

Dated: August 13, 2021



Denis J. Butler, J.S.C.