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DiSanto v Forsyth

258 A.D.2d 497, 684 N.Y.S.2d 628
N.Y.A.D., 1999.
February 08, 1999

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258 A.D.2d 497, 684 N.Y.S.2d 628, 1999 N.Y. Slip Op. 00985

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Frank DiSanto, Appellant,
v.

Sioux Forsyth, Respondent.

Supreme Court, Appellate Division, Second Department, New York
(February 8, 1999)

CITE TITLE AS: DiSanto v Forsyth

Ordered that the order is modified, on the law, by deleting the provisions thereof which denied those branches of the motion which were to dismiss the fourth and fifth counterclaims alleging injurious falsehood and prima facie tort, and substituting therefor provisions granting those branches of the motion; as so modified, the order is affirmed insofar as appealed from, without costs or disbursements.

The plaintiff, Frank DiSanto, commenced this action against the defendant, Sioux Forsyth, the president of Grayarlin Kennels & Farms, Inc., alleging, *inter alia*, that Forsyth mistreated DiSanto's purebred Doberman Pinscher, named Harley. Forsyth claimed that DiSanto knew that Harley's condition was due to a congenital disease and that DiSanto, *inter alia*, defamed her by telling people, some of whom she specifically *498 identified, that Harley's condition was due to Forsyth's "mistreat[ment]", "abuse", and "malnourish[ment]". Forsyth asserted six counterclaims alleging, *inter alia*, injurious falsehood and prima facie tort.

Special damages, which are an essential element of both injurious falsehood and prima facie tort, must be pleaded with sufficient specificity (see, *Freihofer v Hearst Corp.*, 65 NY2d 135; *Nyack Hosp. v Empire Blue Cross & Blue Shield*, 253 AD2d 743; *Penn-Ohio Steel Corp. v Allis-Chalmers Mfg. Co.*, 7 AD2d 441). Because general allegations of lost sales from unidentified lost customers are insufficient (see, *Drug Research Corp. v Curtis Publ. Co.*, 7 NY2d 435; *De Marco-Stone Funeral Home v WRGB Broadcasting*, 203 AD2d 780), DiSanto's motion to dismiss the fourth and fifth counterclaims alleging injurious falsehood and prima facie tort should have been granted.

The parties agree that the resolution of such issues as whether Harley's condition was exacerbated by Forsyth's conduct must be resolved at trial. Since the issues of fact regarding Harley's condition are critical to determining whether DiSanto's alleged statements were tortious, those branches of DiSanto's motion which were to dismiss the remaining counterclaims were properly denied (see, *Alvarez v Prospect Hosp.*, 68 NY2d 320; see also, *Howell v New York Post Co.*, 81 NY2d 115; *Liberman v Gelstein*, 80 NY2d 429; *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183; *Shover v Instant Whip Processors*, 240 AD2d 560; *Warlock Enters. v City Ctr. Assocs.*, 204 AD2d 438; *Jurlique, Inc. v Austral Biolab Pty.*, 187 AD2d 637; *Pappalardo v Westchester Rockland Newspapers*, 101 AD2d 830; *Blowers v Lawyers Coop. Publ. Co.*, 44 AD2d 760).

Miller, J. P., Ritter, Altman and Luciano, JJ., concur.

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- 1998 WL 35177120 (Appellate Brief) Reply Brief of Plaintiff-Appellant (Jul. 23, 1998)
- 1998 WL 35177119 (Appellate Brief) Respondent's Brief (Jul. 16, 1998)
- 1998 WL 35177118 (Appellate Brief) Brief of Plaintiff-Appellant (May 29, 1998)

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