

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33162
C/kmb

_____AD3d_____

Argued - November 15, 2011

REINALDO E. RIVERA, J.P.
JOHN M. LEVENTHAL
SHERI S. ROMAN
SANDRA L. SGROI, JJ.

2010-10507

DECISION & ORDER

Louis F. Giuffre, respondent-appellant, v Mike DiLeo,
et al., appellants-respondents.

(Index No. 14310/05)

Robert A. Ross, Huntington, N.Y. (Theresa M. Mahlstadt of counsel), for appellants-respondents.

Robert A. Siegel, New York, N.Y. (Christopher L. Grayson of counsel), for respondent-appellant.

In a consolidated action, inter alia, to recover damages for defamation, the defendants appeal from so much of an order of the Supreme Court, Suffolk County (Sweeney, J.), dated August 16, 2010, as denied that branch of their motion which was for summary judgment dismissing the cause of action to recover damages for defamation as time-barred, and the plaintiff cross-appeals from so much of the same order as granted that branch of the defendants' motion which was for leave to amend their answer to assert the affirmative defense of statute of limitations.

ORDERED that the order is affirmed, without costs or disbursements.

On June 15, 2005, the plaintiff commenced an action to recover damages for defamation, which was subsequently consolidated with another action against the same defendants. The complaint in the original action alleged that a defamatory statement was posted on the Internet on or about June 15, 2004, and was re-posted at some point after September 1, 2004. In April 2010 the defendants moved for leave to amend their answer to include a defense based on the statute of limitations and for summary judgment dismissing the cause of action to recover damages for

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defamation as time-barred. The Supreme Court granted that branch of the motion which was for leave to amend the answer, but denied that branch of the motion which was for summary judgment. We affirm.

The determination of whether to grant leave to amend a pleading is within the court's discretion, and the exercise of that discretion will not be lightly disturbed (*see Voyticky v Duffy*, 19 AD3d 685, 685). Leave to amend an answer to assert an affirmative defense should generally be granted where the proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that it would prejudice or surprise the opposing party (*see CPLR 3025[b]; Matter of Roberts v Borg*, 35 AD3d 617, 618; *Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d 714). Mere lateness is not a basis for denying amendment unless the lateness is coupled with "significant prejudice to the other side" (*Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d at 716, quoting *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959). Although the defendants waited several years before moving for leave to amend the answer, there was no showing that the plaintiff would be prejudiced, as discovery is ongoing and the plaintiff may still discover relevant information regarding the date of posting or re-posting. Accordingly, the Supreme Court properly granted that branch of the defendants' motion which was for leave to amend their answer to assert the affirmative defense of statute of limitations.

In addition, the Supreme Court correctly denied that branch of the defendants' motion which was for summary judgment dismissing the cause of action to recover damages for defamation as time-barred. While the defendants demonstrated, *prima facie*, that they were entitled to summary judgment because the defendant Mike DiLeo posted the alleged offending statement before June 11, 2004, the plaintiff raised a triable issue of fact as to whether a re-posting of the original post was either through a posting of a modified version of the post or through posting of the post on another website (*see Firth v State of New York*, 98 NY2d 365, 369; *Firth v State of New York*, 306 AD2d 666, 667).

RIVERA, J.P., LEVENTHAL, ROMAN and SGROI, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court