Tener v Cremer
2012 NY Slip Op 32022(U)
July 16, 2012
Sup Ct, NY County
Docket Number: 104583/10
Judge: Doris Ling-Cohan
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SCANNED ON 8/2/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN, Justice

PART 36

Tener

-v-

Cremer

INDEX NO. 104583/2010

MOTION DATE

MOTION SEQ. NO. 003

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits (+ memo) No(s). 1, 2

Answering Affidavits — Exhibits (+ memo) No(s). 3, 4

Replying Affidavits (+ memo) No(s). 5

interim orders dated 11/28/2011 + 3/9/2012 6, 7

Upon the foregoing papers, it is ordered that this motion ~~is~~ to dismiss is granted in accordance with the attached memorandum decision.

FILED

AUG 01 2012

NEW YORK COUNTY CLERK'S OFFICE

Additional Submissions:

(Supplemental) Affirmations M. Wang dated 12/21/2011 + 1/9/2011 (in response to 11/28/2011 order) 8, 9

Cusak Affirmation NYLC 12/16/2011 + Supp't affidavits (in response to 11/28/2011 order) 10, 11, 12

(Supplemental) Affirmations J. Overland, Jr. 12/28/2011 (in response to 11/28/2011 order) + 12/20/2011 13, 14

defendant's letter dated 3/6/2012; plaintiff's response 3/8/2012 15, 16

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

Dated: 7-16-2012

J.S.C.

DORIS LING-COHAN

1. CHECK ONE: ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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TRILBY J. TENER, M.D.

Plaintiff,

-against-

Index No. 104583/10

MIRIAM CREMER, M.D., *et al.*,

Motion Seq.No. 003

Defendants.

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DORIS LING-COHAN, J.S.C.:

BACKGROUND

This is a suit by plaintiff doctor, Trilby J. Tener, for, *inter alia,* two million dollars arising out of an allegedly defamatory posting about plaintiff on a website known as and doing business as www.vitals.com (Vitals). Defendant Miriam Cremer, M.D., moves for an order dismissing the complaint, pursuant to CPLR 3211 (a) (5) and (7).

The single anonymous statement (Statement) which gave rise to this action was first published on April 12, 2009 on the Vitals website, an on-line forum expressly dedicated to opinions about doctors so that people may comment on and rate medical professionals for the benefit of others seeking opinions and information about such professionals. The Statement read: "Dr. Tener is a terrible doctor. She is mentally unstable and has poor skills. Stay far away!" The complaint alleges that plaintiff discovered the Statement on May 28, 2009, when an on-line search of her name on the web site www.google.com, referred her to Vitals.

DISCUSSION

Dismissal Based on Untimeliness

CPLR 215 (3) provides that claims sounding in libel or slander must be commenced within one year. In *Firth v State of New York* (98 NY2d 365, 370 [2002]), the Court held that the "single publication" rule, pursuant to which a defamation claim accrues upon the first publication of the offending statement, is applicable to statements posted on the internet. Consequently, plaintiff had until April 11, 2010, to commence this action. A few days prior to the expiration date, on April 8, 2010, plaintiff filed a summons with notice, naming as defendants Pamela Wilkie, and a number of "Doe"s, but failed to mention moving defendant, Dr. Cremer. It was not until a several months past the expiration date, on June 8, 2010, however, that plaintiff filed an amended summons, removing Ms. Wilkie[1], as a responsible party, and substituting Dr. Cremer.

Plaintiff contends that this action is timely, because it was commenced pursuant to CPLR 1024. CPLR 1024 allows a party

> who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, [to] proceed against such person as an unknown party by designating so much of his name and identity as is known.

An action commenced pursuant to filing under CPLR 1024 tolls the statute of limitations (*Bumpus v New York City Tr. Auth.*, 66 AD3d 26 [2d Dept 2009]; *Tucker v Lorieo*, 291 AD2d 261 [1st Dept 2002]), and CPLR 306-b affords the plaintiff an additional 120 days within

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[1]Pamela Wilkie's name is also spelt "Willkie" in Plaintiff's Affidavit in Opposition. (Para.24, Footnote 7).

which to identify and to serve the proper defendant. However, this extraordinary procedure is not without limits: a plaintiff seeking to proceed pursuant to CPLR 1024 must "demonstrate[] that he [or she] conducted a diligent inquiry into the actual identities of the intended defendants **before the expiration** of the statutory period." *Goldberg v Boatmax://,Inc.*, 41 AD3d 255, 256 (1st Dept 2007) (emphasis supplied, citing *Tucker v Lorieo*, 291 AD2d 261); *see also Erdogan v Toothsavers Dental Serv. P.C.*, 57 AD3d 314 (1st Dept 2008). As explained further below,here, plaintiff failed to make the timely efforts to identify the defendant that would entitle her to avail herself of the special procedural mechanism provided by the CPLR.

The complaint alleges, and plaintiff's affidavit states that, the day after she read the Statement, she contacted Vitals and sought to have the Statement expunged. Allegedly, she learned that the best that she could do was to open her own account with Vitals, which would permit her to "hide" the Statement. According to plaintiff, she successfully hid the Statement shortly thereafter, and then continued to seek ways to remove the Statement from the Vitals web site.

The complaint further alleges that plaintiff "immediately initiated a proceeding to compel Vitals to provide information" that would help plaintiff identify the person who had posted the Statement. Complaint, at 24. However, in actuality, plaintiff did

not commence that proceeding[2] until March 26, 2010 - almost 10 months after she first discovered the Statement, and only 16 days before her time to commence this action ran.[3] Indeed, plaintiff admits in her affidavit that she had the wherewithal to consult an attorney acquaintance shortly after discovering the posting, who discouraged her, but only finally retained counsel belatedly on or about March 23, 2010 (almost 10 months after her discovery of the statement). Prior to that time, (despite her swift action to hide the offending post) she apparently merely confined her investigation to merely reviewing her e-mails and correspondence, in attempting to ascertain the identity of the person who had posted the Statement. Such activity, however, does not constitute

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[2] Such proceeding was titled *In the Matter of Trilby J. Tener, M.D. v MDX Medical Inc. and/or its subsidiary, www.vitals.com* (Index No. 103972/2010)("Tener v. MDX").

[3] In *Tener v. MDX*, Hon. Alice Schlesinger expressed skepticism as to this matter and stated on the record:

> "This matter is before me and it sounds in pre-action discovery. When this was first brought in as an order to show cause, I had some doubts as to whether or not I wanted to sign the order to show cause at all because what it essentially was, was asking for information to be used in a lawsuit sounding in defamation against, at this point, an anonymous poster who had made some unfavorable comments that referred to Dr. Trilby Tener. She is a medical doctor. Specifically what those comments were that Dr. Tener was 'a terrible doctor', that she had 'poor skills' and that she was 'mentally unstable' and finally to 'stay far away'. Presumably that was a direction to the reader to stay far away.
>
> I had serious doubts because there was a question in my mind whether those statements would even give rise to a defamation suit because they sound very much as opinions as opposed to stating facts and opinion is protected expression, pursuant to the First Amendment".

a diligent effort to ascertain the identity of the person who should be a defendant, and plaintiff's last moment retention of an attorney, less than three weeks before the expiration of the one-year period, does not make this action timely. Where a plaintiff relies upon CPLR 1024, the plaintiff's efforts to identify the proper defendant are not timely when they are first undertaken shortly before the expiration of the limitations period, as occurred herein. *Fountain v Ocean View II Assoc.*, 266 AD2d 339 (2d Dept 1999); *see also Justin v Orshan*, 14 AD3d 492 (2d Dept 2005). Thus, plaintiff's inexplicable and belated attempts to ascertain the true identity of the poster do not warrant the special protection of CPLR 1024.

Plaintiff contends that the instant motion is premature, because this court has not yet held the hearing provided for by the September 22, 2011 Appellate Division decision, as to the feasibility and cost of the retrieval of certain electronically stored information by non-party New York University Langone Medical Center.[4] *See Tener v Cremer*, 89 AD3d 75 (1st Dept 2011).

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[4] The underlying motion for contempt, which was denied by this court in its September 9, 2010 decision, was filed by plaintiff against non-party NYU Langone Medical Center, when, in response to a subpoena, it had indicated to plaintiff that it could not retrieve the computer information that plaintiff sought from such not-for-profit medical institution.

In the appeal of the order denying contempt, the Appellate Division reversed this court's order dated September 9, 2010 (denying contempt against a non-party), utilizing reply papers that were submitted to the Appellate Division as part of the appellate record, which had not been received or used by this Part (as specifically reflected in this court's September 9, 2010 decision), given that such reply papers were not included in the motion papers submitted to this Part.

Subsequently, (when this court became aware that

the Appellate Division rendered its decision utilizing reply papers that this court did not have the benefit of reviewing) this court issued an order dated November 28, 2011, requiring an explanation as to why the appellate "record" was markedly different than the submissions before this Part and the court file (having also reviewed the entire court file, which showed an absence of plaintiff's reply).

In response, significantly, the parties and non-party NYU Langone Medical Center did not dispute that such reply papers were not part of the record on which I had based my September 9, 2010 decision/order.

Specifically, while plaintiff has cleared up part of the mystery of how her reply (which submitted, for the first time, an expert's affidavit) was made a part of the appellate "record" (given that it appears that such reply had been submitted to the prior judge's court attorney, who apparently did not place it with the motion file or case file, and was missing upon the motion file's transfer to this Part for decision), plaintiff has, nonetheless, utterly not refuted that such reply was never submitted to this Part , and hence clearly not considered when rendering the September 9,2010 decision, which denied contempt against non-party NYU Langone Medical Center.

Nor has plaintiff answered the question of why she simply did not make a motion to renew/reargue (a routine and inexpensive procedural mechanism to re-visit an issue before the court), upon receipt of my September 9, 2010 decision, which clearly indicated in the recitation of papers portion that only four (4) documents were considered: "Notice of Motion/Order to Show Cause...1,2" and Answering Affidavits...3,4", with the "Reply Affidavit" space left noticeably and intentionally blank. Moreover, the body of the decision specifically mentioned the absence of any reply submitted by plaintiff: "This [non-party NYU Langone Medical Center's] allegation is unrefuted as a reply affidavit contradicting such allegations has not been supplied." (emphasis supplied).

The court notes that attorneys routinely check such recitation of papers and file such motions to renew/reargue, regularly. If plaintiff's counsel had employed such a routine procedural mechanism, considerable resources on all sides, including his client's financial resources, the defendant's, the non-party NYU Langone Medical Center's and the Appellate Division's (which was forced to consider an appellate "record" markedly different than the submissions provided to this trial judge), would not have been wasted.

Incredibly, instead of employing this simple procedural mechanism, plaintiff (who complains of "defamation")and her counsel have decided that the better avenue to take was to make blatantly inappropriate and wild accusations against this court of "bias" and "apparent impropriety", after allegedly conducting "Internet research" into this court's background and raising an extremely attenuated "connection" to non-party NYU Langone Medical Center,

Plaintiff believes that such information might help identify the person who posted the Statement. While the court is sympathetic to plaintiff's desire to ascertain the identity of that person, such identification would not cure the untimeliness of this action, let alone the untimeliness of an action against a defendant other than Dr. Cremer.

The court notes that, significantly, the subpoena, which was served to obtain such electronically stored information from non-party NYU Langone Medical Center[5] was not served until on or about April 30, 2010, after the applicable statute of limitations had already run. Thus, the within action is not timely and must be dismissed.

Dismissal for Failure to State a Cause of Action

Additionally, as explained further below, even if this action was found to be timely, dismissal is warranted for failure to state a cause of action, as the alleged defamatory statements are

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that I attended a completely distinct entity: NYU Law School- over 30 years ago.

Plaintiff also bases an unwarranted claim of bias merely because she disagrees with the issuance of the November 28, 2011 order, which simply requested an explanation as to how an appellate court was able to review an "appellate record" markedly different than the one this trial court considered, as no reply was submitted to this Part or considered in rendering the September 9, 2010 decision denying contempt.

See also footnote 9, infra, for a detailed discussion on plaintiff's unwarranted accusations.

[5] This non-party subpoena was the subject of the September 22, 2011 Appellate Division decision.

statements of opinion, and, thus, are not actionable. Expressions of opinion are distinct from assertions of fact and cannot be the subject of an action for defamation. *Mann v. Abel*, 10 NY3d 271, 276 (2008) (citing *Weiner v. Doubleday and Co.*, 74 NY2d 586, 593 (1989)).

Here, the statement was posted, anonymously, on an Internet message board - a format and forum commonly used by unidentified writers to make unsupported and often baseless assertions of opinions. Such website specifically calls for opinions as to medical doctors. The anonymous statement contains no accompanying factual description and no details describing any particular interaction that the poster may have had with Dr. Tener. Indeed, as plaintiff herself concedes, the posting "was made alone without factual support to the statement." Pl.'s Opp.Brief at 8.

Further, in a claim for defamation, "the words must be construed in the context of the entire statement as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable." *Dillon v. City of New York*, 261 AD2d 34, 38 (1st Dept 1999). Here, the Vitals.com *website, specifically states* in its "Terms of use" that, "Vitals and the Content include statements of *opinion* and *not statements of fact*..."(emphasis supplied).[6] Wang Aff. Ex. 2. Thus, any reasonable person using Vitals.com has been

[6] The court notes that, in opposition, plaintiff has not argued that such "Terms of use" were not in effect at the time of the subject posting.

expressly put on notice that the postings contained on such website are mere opinions, and not based upon facts.

As stated by the Appellate Division, First Department in *Sandals Resorts Intl. Ltd. v. Google*, Inc., (86 AD3d 32 [1st Dept 2011]), a case involving allegedly defamatory anonymous emails sent to multiple undisclosed recipients that criticized the corporation's treatment of native Jamaicans, in affirming dismissal:

> **readers give less credence to allegedly defamatory remarks published on the Internet** than to similar remarks made in other contexts...**Indeed, the anonymity...makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat it contents as opinion** rather than as fact.

Id. at 44 (emphasis supplied). Significantly, the First Department further instructed that,

> **[t]he culture of Internet communications**, as distinct from that of print media such as newspapers and magazines, **has been characterized as encouraging a 'freewheeling, anything-goes writing style'...' 'It is imperative that courts learn to view libel allegations within the unique context of the Internet**. In determining whether a plaintiff's complaint includes a published "false and defamatory statement concerning another", commentators have argued that the defamatory import of the communication must be viewed in light of the fact that bulletin boards and chat rooms "are often the repository of a wide range of casual, emotive, and imprecise speech," and that the **online "recipients of [offensive] statements do not necessarily attribute the same level of credence to the statements [that] they would accord to statements made in other contexts"**.

Id. at 43-44 (citations omitted; emphasis supplied).[7] Thus, in

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[7] *Sandals Resorts Intl. Ltd., supra,* involved pre-action discovery of an alleged defamation claim, which the Appellate Division denied.

accordance with the prevailing case law in this Department, plaintiff has failed to assert an actionable claim.[8]

Defendant's and plaintiff's[9] further requests, which were not

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[8] Defendant has also raised the issue that plaintiff's original summons was jurisdictionally defective, which this court need not reach.

[9] The court notes that, while plaintiff has not, in fact, filed a notice of motion seeking the recusal of this court on this matter, plaintiff has made such request by letters to the court, to the Supervising Judge, and in her attorney's affirmation in opposition to the within motion. Overland Aff.in Opp., ¶8-9. It is hornbook law, however, that requests of the court are to be made by notice of motion, in order to provide notice, to allow parties an opportunity to submit opposition, rather than inserted randomly in submissions or by letters to the Judge. *See* CPLR 2214(a). Moreover, there is no provision in the CPLR which authorizes motion practice by letter. The high volume of this Court's case-load, makes letter writing an extremely difficult, if not impossible tool, to address parties' requests and concerns. Plaintiff's outlandish claim with respect to recusal does not merit a response, but, undoubtedly, will be raised on appeal by plaintiff; therefore, the court will briefly address it.

Apparently, in seeking recusal, based on alleged "Internet research" conducted as to this court's "background", plaintiff's counsel relies on his client's accusations without a filter. Ironically and incredibly, plaintiff (who complains of "defamation") and her attorney, have accused this court of being biased against plaintiff,in favor of a non-party, NYU Langone Medical Center, claiming that I attended and received funding to attend school from a totally distinct entity under NYU's massive umbrella of institutions: NYU Law School.

While plaintiff is correct that I graduated from NYU Law School -over 30 years ago- I note that at least one of the Appellate Division judges who presided over the previous appeal in this case, if not more, did so as well; yet, plaintiff made no such request for recusal at the Appellate Division. Not surprisingly, plaintiff only requested recusal, when this court issued rulings, which she did not agree with, concluding that the only reason is that it "must have" been the result of "bias".

Further, plaintiff and her attorney are absolutely incorrect in their assertion that NYU funded a scholarship for my law school education, which, ironically, points to the inherent danger of relying on "Internet research". Nor does plaintiff's raising of the spector of "appearance of impropriety" form a basis of recusal. Plaintiff's allegations of recusal amount to nothing more than a "sour grapes" litigation tactic. "[W]hen there is no ground for recusal, recusal should not be ordered." *Silber v. Silber,* 84 AD3d

included in the notice of motion as part of the relief being sought are denied. *See* CPLR 2214(a).

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted, and the complaint is dismissed with costs as calculated by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that within 45 days of entry of this order, defendant shall serve a copy upon plaintiff, with notice of entry.

Dated: 7/16/12

Doris Ling-Cohan, J.S.C.

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931,932 (2nd Dept 2011); *see also People v Moreno*, 70 NY2d 403, 405 (1987), *Katz v Denzer*, 70 AD2d 548, 548-549 (1st Dept 1979); *R & R Capital LLC v Merritt*, 56 AD3d 370, 370 (1st Dept 2008).

Moreover, as NYU (Medical Center, Law or any other part of NYU) is not even a party to this case, recusal is absolutely not warranted.

*See also*footnote 4, *supra*, which also addresses plaintiff's claims of recusal.