

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

_____ x Index
UNION PLAZA NURSING HOME, INC., Number 27844 2003
et al.

Motion
Date May 26, 2004

- against -

Motion
Cal. Number 40

MING PAO (NEW YORK) INC., et al.
_____ x

The following papers numbered 1 to 12 read on this motion by defendants Sing Tao Newspapers New York Ltd., Robin Mui and Yu Kwong Chan (the Sing Tao defendants) to dismiss the action pursuant to CPLR 3211(a)(7) and 3016(a) for failure to state a cause of action.

	<u>Papers Numbered</u>
<u>Notice of Motion - Affidavits - Exhibits</u>	1-4
<u>Answering Affidavits - Exhibits</u>	5-8
<u>Reply Affidavits</u>	9-12

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiffs commenced this action to recover damages for purported libelous statements made in an article, published in the Chinese-language daily newspaper, Sing Tao Daily by defendants Sing Tao Newspapers New York Ltd. and Robin Mui, on August 19, 2003, and in a separate article, published on the same day in Ming Pao, another Chinese-language newspaper, by defendant Ming Pao (New York), Inc. The articles relate to an interview with defendant Alice Fu a/k/a Fu Chun Chun regarding the care and treatment her father received while a resident at Union Plaza Nursing Home.

At the outset, the court notes that notwithstanding references in certain papers by defendants Ming Pao (New York), Inc., Francis Tiong, Josephine Chang and Gang Li (Ming Pao defendants), as to the existence of "motions," the only motion before this court is the one made by the Sing Tao defendants seeking to dismiss the action pursuant to CPLR 3211(a)(7) and 3016(a) for failure to state a cause of action. Furthermore, although counsel for the Ming Pao defendants, in his reply affirmation dated May 3, 2004, makes reference to his "initial" affirmation dated February 5, 2004, such affirmation is not among the papers submitted herein, and thus, was not considered by the court.

The Sing Tao defendants assert that the complaint fails to identify any specific statement or particular words appearing in the August 19, 2003 article in the Sing Tao Daily that are alleged to be false or defamatory, and instead quotes virtually the entire article verbatim, and annexes a copy of the article along with an English translation. The Sing Tao defendants argue that such procedure violates the strict pleading requirements found in CPLR 3016 relative to a complaint in a defamation action. The Sing Tao defendants further argue that as a consequence of plaintiffs' failure to specifically identify the alleged defamatory statements in the article, they cannot properly frame or choose a defense, including one based upon the broad protection of the First Amendment to the United States Constitution regarding a newspaper's reporting of expressions of opinion.

Plaintiffs oppose the motion contending that the complaint contains the requisite specific allegations with respect to the Sing Tao defendants. In addition, plaintiffs assert that they have properly attached the newspaper article with a certified copy of the translation as an exhibit to the complaint, and thus, the claimed libelous material can be easily located. Moreover, plaintiffs contend that the Sing Tao defendants may not rely upon a defense based upon expression of pure opinion under the First Amendment. Plaintiffs assert that the article is not one of pure opinion, but rather, creates the impression that defendant Fu is aware of certain facts, unknown to the audience of readers, which support her poor opinion of the nursing home and its care and treatment of her father.

CPLR 3016 requires that, in an action to recover damages for libel or slander, "the particular words complained of shall be set forth in the complaint" (CPLR 3016[a]). Such requirement that the defamatory words must be quoted verbatim is strictly enforced (Erlitz v Segal, Liling & Erlitz, 142 AD2d 710 [1988]; Gardner v

Alexander Rent-A-Car, 28 AD2d 667 [1967]). "The reason for the requirement of specific pleading in defamation cases is to give adequate notice to the defendant as to the occurrence constituting the wrong and to discourage the institution of vexatious actions (see Foley v D'Agostino, 21 AD2d 60; 3 Weinstein-Korn-Miller, NY Civ Prac, par 3016.01)," (Pappalardo v Westchester Rockland Newspapers, 101 AD2d 830, affd 64 NY2d 862 [1985]).

In this instance, notwithstanding the virtual incorporation of the entire translation of the Sing Pao article into the complaint as allegations, and the annexation of both the translation and original article to the complaint (CPLR 3014), it is not evident from such allegations and translated article which statements therein are claimed to be false and defamatory, since some of the statements therein are incapable of defamatory meaning (see Hausch v Clarke, 298 AD2d 429, 430 [2002]; Freeze Right Refrigeration & Air Conditioning Servs., Inc. v City of New York, 101 AD2d 175, 178, n 2 [1984]; Edison v Viva Int., Ltd., 70 AD2d 379 [1979]). Nor does the affidavit of plaintiff Charlton Rhee, the assistant administrator of plaintiff, submitted by plaintiffs in opposition to the motion, remedy such pleading deficiency (cf. Jacobs v Haber, 133 AD2d 739 [1987]). Nevertheless, the affidavit of plaintiff Rhee suffices to show that plaintiff Union Plaza Nursing Home, Inc. is possessed of an arguably meritorious cause of action for defamation, and to permit plaintiffs to replead (CPLR 3211[e]). The affidavit, however, is insufficient to demonstrate that plaintiff Rhee has a viable cause of action for defamation against the Sing Tao defendants. No mention is made of plaintiff Rhee by name, or by her position, in the Sing Tao article, and plaintiff Rhee has failed to show that readers of the article would be able to discern from the facts referred to in the article that any defamatory statements were "of and concerning" her (see Springer v Viking Press, 60 NY2d 916 [1983]; Gelencser v Orange County Publications, Div. of Ottaway Newspapers, Inc., 116 AD2d 696 [1986]).

The motion by the Sing Tao defendants to dismiss the complaint asserted against them is granted, with leave to plaintiffs to replead the defamation claims, in accordance with CPLR 3016, asserted by plaintiff Union Plaza Nursing Home, Inc. against the Sing Tao defendants within 20 days of service of a copy of this order with notice of entry.

Dated: August 20, 2004
