

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE MARGUERITE A. GRAYS IA Part 4

Justice

| | | |
|-----------------------------------|---|---------------------------------------|
| | x | |
| CHARLES DUN-ZHENG YAN, | | Index Number <u>8004</u> 2003 |
| Plaintiff, | | Motion Date <u>August 12, 2003</u> |
| -against- | | Motion Cal. Number <u>48</u> |
| NANCY KLEIN AND JEANETTE DIAMOND, | | |
| Defendants. | | |
| | x | |

The following papers numbered 1 to 6 were read on this motion by the defendants, in effect, pursuant to CPLR 3211 and pursuant to 22 NYCRR 130-1.1, to dismiss the complaint and to permanently enjoin the plaintiff and to impose sanctions against him.

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Notice of Motion - Affidavits - Exhibits | 1 - 4 |
| Answering Affidavits - Exhibits | 5 - 6 |

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

I. The Relevant Facts

The plaintiff Charles Dun-Zheng Yan ("Yan"), was employed by the Luxottica Group ("Luxottica"), and received several warnings in July, 1997, before he was terminated for insubordination in October, 1997. Yan's direct supervisor at Luxottica was Nancy Klein ("Klein"), the General Manager of his department is Ronnie Potter ("Potter"), and the Director of Human Resources is Jeannette Diamond ("Diamond").

Previously, Yan commenced an action against Klein, alleging defamation. Following an inquest, the action against Klein was dismissed with prejudice, and his motion for reconsideration was denied (Index No. 2927/98 [Kitzes, J.]). In the order denying reconsideration dated October 20, 1998, this court (Kitzes, J.) found that Yan was discharged for cause, he was an employee at will with no employment contract, and he failed to show how his reputation was injured or what damages he sustained by being fired. Yan's appeal from the order denying reconsideration was dismissed by the Appellate Division, Second Department (see, Yan v Klein, 266 AD2d 209).

At or about the same time he commenced that action, Yan commenced a separate action against Potter, also based upon defamation, as well as allegations of fraud, all arising from the same termination (Index No. 022392/98). By decision and order dated October 11, 2002, this court (Price, J.) granted Potter's motion for summary judgment dismissing that complaint. The court found that the alleged defamatory statements were subject to qualified privilege as they were made in the course of employment, there was no demonstration of actual malice, and the complaint failed to set forth any cognizable claim for fraud.

During and after the Potter action, Yan wrote to several Luxottica employees, threatening further legal action against Klein as well as Diamond, and he requested personal meetings with Luxottica management. In doing so, he disregarded several instructions by Luxottica attorneys that he address all correspondence to them.

Yan then commenced this action against Klein and Diamond, alleging defamation based upon his termination for insubordination, as well as allegations of fraud and mistake; however, the complaint is devoid of allegations concerning the alleged defamation, fraud or mistake by Diamond.

The defendants have not interposed any answer and, instead, have moved, in effect, to dismiss the complaint (see, CPLR 3211[a][5], [7]).

II. Motion

Klein and Diamond contend that: (1) the fraud and defamation claims are barred by res judicata and collateral estoppel in view of the prior actions against Klein and Potter; (2) the complaint fails to state a cause of action for fraud or for mistake; and, (3) the allegations of defamation must be dismissed based upon the statute of limitations. Klein and Diamond also contend that they are entitled to injunctive relief and sanctions as a result of Yan's frivolous litigation.

Yan opposes the motion, asserting, inter alia, that: (1) the action based upon mistake and fraud is subject to a six-year statute of limitations; (2) the doctrines of collateral estoppel and res judicata do not preclude relitigation of his claims, and summary judgment is improper prior to discovery; and, (3) the prior determinations in the Klein and Potter actions were incorrect.

III. Decision

The essential ingredients of collateral estoppel are that: (1) the identical issue was necessarily decided in the prior action and is decisive of the present action; and, (2) the party to be precluded from relitigating the issue had a full and fair opportunity to contest the prior determination (see, Juan C. v Cortines, 89 NY2d 659, 667, quoting, Kaufman v Lily & Co., 65 NY2d 449, 455). The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (see, Juan C. v Cortines, supra).

The doctrine of res judicata holds that, as to parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action (see, Couri v Westchester Country Club, Inc., 186 AD2d 715, appeal dismissed in part, lv denied in part, 81 NY2d 912; Newsday, Inc. v Ross, 80 AD2d 1).

Here, Klein, Potter and Diamond are or have been sued solely as a result of statements they made or actions they took while acting as managers for Luxottica, and in warning or terminating Yan while acting in the same capacities. As a result, with respect to the prior actions and this action, there is an identity of issues and parties (see, Brugman v City of New York, 102 AD2d 413, affd 64 NY2d 1011; Newsday, Inc. v Ross, supra). Yan has failed to demonstrate the absence of a full and fair opportunity to litigate the issues of defamation, fraud or mistake in the prior actions.

The prior action against Klein is, therefore, res judicata with respect to the allegations made against her in this action (see, Couri v Westchester Country Club, Inc., supra). Similarly, the prior action against Potter collaterally estops Yan from raising the same allegations of defamation, fraud and mistake, that are raised in this action (see, Brugman v City of New York, supra; Matter of Newsday, Inc. v Ross, supra).¹

As a result, the defendants' motion to dismiss the complaint is granted, and the complaint is dismissed (see, CPLR 3211[a][5],

[7]).

Pursuant to 22 NYCRR 130-1.1, a court may enjoin frivolous litigation of issues through the issuance of a permanent injunction and may impose sanctions where a party raises arguments which are belied by the record and completely without merit in fact or law (see, Braten v Finkelstein, 235 AD2d 513; Murray v National Broadcasting Co., Inc., 214 AD2d 708; Sassower v Signorelli, 99 AD2d 358, lv denied, 61 NY2d 985).

Given the numerous prior determinations against Yan, and his refusal to discontinue his letter writing campaign against employees of Luxottica, the defendants are entitled to an injunction which permanently enjoins Yan from filing further legal proceedings against Klein, Diamond or Potter, or any other current or former employees of Luxottica or against Luxottica itself, which arise from his past employment with Luxottica (see, Braten v Finkelstein, supra; Murray v National Broadcasting Co., Inc., supra).

Moreover, as Yan's arguments are completely without merit in law or fact and have been addressed on prior occasions, a hearing is required to determine what, if any, costs and/or sanctions, including attorneys' fees, should be imposed against Yan (see, 22 NYCRR 130-1.1[d]). As a result, the parties are directed to appear for a hearing before this court to be held on Tuesday, December 9, 2003, at 10:00 A.M. in Courtroom 505, for a hearing on the monetary sanction to be imposed, if any, upon Yan for his frivolous conduct.

Conclusion

Accordingly, based upon the papers submitted to this court for consideration and the determinations set forth above, it is

ORDERED that the branch of the motion by the defendants, in effect, to dismiss the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the defendants shall file and serve a copy of this order, with notice of entry upon the plaintiff within thirty (30) days of the date of this order; and it is further

ORDERED that the branch of the motion by the defendants to permanently enjoin the plaintiff and to impose sanctions against him is granted to the extent that the plaintiff is permanently enjoined from filing further legal proceedings against Nancy Klein, Jeanette Diamond or Ronnie Potter, or any other current or former employees of Luxottica Group or against Luxottica Group itself, arising from his past employment with Luxottica Group, and the parties are directed to appear for a hearing before this court to

be held on Tuesday, December 9, 2003, at 10:00 A.M. in Courtroom 505, for a hearing on the monetary sanction, if any, to be imposed upon the plaintiff for his frivolous conduct and, otherwise, that branch of the motion is denied.

Dated:10/15/03

J.S.C.

. *Even assuming that the doctrines of res judicata and collateral estoppel did not apply, this court would find that the allegations of fraud and mistake fail to state a cause of action and, like the allegations of defamation, are time barred (see, Mazella v Markowitz, 303 AD2d 564; Julian v Carroll, 270 AD2d 457; Gleason v Spota, 194 AD2d 764; CPLR 203[g], 215).*