

Liota v Gannalo

2007 NY Slip Op 32504(U)

August 10, 2007

Supreme Court, New York County

Docket Number: 0114658/2004

Judge: Jane S. Solomon

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 85

Justice

Peter M. Lista

INDEX NO. 114658/04

MOTION DATE 3/19/07

- v -

James M. Gannalo

MOTION SEQ. NO. 03

MOTION CAL. NO. _____

The following papers, numbered 1 to 10 were read on this motion to/for answer complaint

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-6

Replying Affidavits _____

7-10

Cross-Motion: Yes No

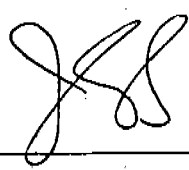
Upon the foregoing papers, it is ordered that this motion is decided in accordance with the answered memorandum decision and order.

FILED

AUG 14 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 8/10/07



JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 55

-----X

PETER M. LIOTA,

Plaintiff,

-against-

INDEX NO. 114658/04

JAMES M. GANNALO,

DECISION AND ORDER

Defendant.

-----X

JANE S. SOLOMON, J.

This is an action seeking damages for defamation. The underlying facts are set forth in this court's May 25, 2006 decision. Plaintiff Peter M. Liota now moves, pursuant to CPLR §§ 3025 and 3124, for an order granting him leave to amend his complaint, compelling defendant to provide certain discovery, and postponing the deadline for filing a note of issue. Defendant James M. Gannalo cross-moves for an order striking certain portions of plaintiff's bill of particulars.

The Motion To Amend

The amendments that plaintiff seeks to make consist of additional allegations of defamatory statements on the part of defendant. A number of those statements are contained in an anonymous letter addressed to the president of the American Society of Crime Laboratory Directors and mailed, according to plaintiff, in or about November 2005. Others were allegedly made, in or about October 2005, to attorneys for criminal defendants, to be used by such attorneys in warding off, or impeaching, plaintiff's or another police officer's expert

ballistics testimony in criminal trials. The remaining statements appear in documents dated, respectively, April 5, 2004, July 8, 2004, and July 13, 2004. The April 5, 2004 document is a memorandum from defendant to Lieutenant James Kenny, the then-commanding officer of the Firearms Analysis Section. That document stated, among other things, that plaintiff had "deficiencies [that] illustrate weakness and possibly a lack of understanding of the most basic foundations of microscopic comparison." The July 8, 2004 document, a memorandum from defendant to the director of the NYPD Laboratory, in which defendant defends his own actions in regard to plaintiff, states, among other things, that plaintiff's "comprehension and articulation of proper scientific methodology and conclusions were discovered to be disjointed and confusing while answering commonly asked testimony questions," and refers to plaintiff's "apparent weakness in examining and evaluating bullet evidence." The July 13, 2004 document stated that plaintiff agreed with defendant's purported corrections to plaintiff's work.

While leave to amend pleadings is to be freely given, absent prejudice to the opposing party, or surprise resulting directly from delay (Lanpont v. Savvas Cab Corp., 244 A.D.2d 208 [1st Dep't 1997]; Strook & Strook & Lavan & Beltramini, 157 A.D.2d 590 [1st Dep't 1990]), a court is required to examine the merits of any proposed pleading and to deny the motion for leave if the proposed pleading plainly lacks merit, or is contradicted

by documentary evidence. Sharon Ava & Co., Inc. v. Olympic Tower Assocs., 259 A.D.2d 315 (1st Dep't 1999). A motion for leave to amend must be supported by an affidavit of merits "and evidentiary proof that could be considered upon a motion for summary judgment." Zaid Theatre Corp. v. Sona Realty Co., 18 A.D.3d 352, 355 (1st Dep't 2005), quoting Nab-Tern Constructors v. City of New York, 123 A.D.2d 571, 572 (1st Dep't 1986).

As an initial matter, defendant contends that all of the proposed amendments are time-barred, and that plaintiff's argument that they are not so barred, because they constitute republications, is made improperly for the first time in plaintiff's reply papers. Plaintiff's argument as to republication is made in response to defendant's argument that the proffered amendments are time-barred. Plaintiff had no reason to make that argument in his initial papers, and the appearance of the argument in plaintiff's reply is entirely proper. However, plaintiff's argument is also entirely misplaced. The limitations period for actions sounding in defamation is one year (CPLR § 215[3]), and the cause of action accrues at the time that the defamatory statement is made, not at a subsequent time that a plaintiff learns of it. Rand v. New York Times Co., 75 A.D.2d 417 (1st Dep't 1980). Pursuant to the "single publication rule," to which New York adheres, "the publication of a defamatory statement in a single issue of a newspaper ... is, in legal effect, one publication which gives

rise to one cause of action.'" Firth v.State of New York, 98 N.Y.2d 365,. 369 (2002), quoting Gregoire v.Putnam's Sons, 298 N.Y. 119, 123 (1948). "Republication, retriggering the period of limitations, occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely 'a delayed circulation of the original edition.'" Id. at 371, quoting Rinaldi v.Viking Penguin, 52 N.Y.2d 422, 435 (1981). Assuming that each of the new statements, that plaintiff wishes to allege, is a republication that retriggers the one-year limitations period, it remains the case that, by notice of motion, dated January 7, 2007, plaintiff seeks to allege statements made in 2004 and 2005.

Nor does CPLR § 203(f) aid plaintiff. That section, which is most often invoked by plaintiffs who seek to add new party defendants, provides that:

[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.

Thus, for example, a claim for wrongful death, brought on behalf of the estate of a man who had brought suit for the injury of which he later died, has been held to relate back to the initial complaint, because that complaint gave notice of the transactions on which the wrongful death cause of action was based. See

Caffaro v. Trayna, 35 N.Y.2d 245 (1974). Here, however, the initial complaint is based upon a number of discrete statements and gives no notice that other statements will be at issue. Accordingly, the proposed amendments do not relate back to the initial complaint, and they are time-barred.

The court adds, parenthetically, that plaintiff's argument that the very anonymity of the anonymous letter should create an estoppel on his behalf, is untenable. As a case cited by plaintiff explains, "[w]here concealment without actual misrepresentation is claimed to have prevented a plaintiff from having commenced a timely action, the plaintiff must demonstrate a fiduciary relationship ... which gave the defendant an obligation to inform him or her of facts underlying the claim." Gleason v. Spota, 194 A.D.2d 764, 765 (2d Dep't 1993).

The Motion To Compel and To Extend the Deadline for Filing the Note of Issue

Plaintiff seeks to obtain further discovery in connection with new allegations in the proposed amended complaint, which request is moot in light of the foregoing.

He also demands that Gannalo provide handwriting exemplars because he claims that Gannalo's initials on evidence envelopes--indicating his audit of plaintiff's work--do not all appear to be written by the same hand. At his deposition, Gannalo was shown photocopies of these evidence envelopes. He explained that sometimes he writes his initials in block print,

and other times in cursive, which may explain why his initials appear different on certain documents. He was unable to state definitively that the handwriting on each document was his own.

Gannalo argues persuasively that plaintiff has not established that an exemplar is material and necessary to the prosecution of this matter. CPLR 3101(a). That Gannalo audited plaintiff's work is not disputed, and it is not clear how plaintiff advances his case by suggesting that other people also may have put Gannalo's initials on the evidence envelopes.

Finally, plaintiff further demands that Gannalo provide (1) documents in his possession, such as time sheets, showing the hours he worked for the NYPD; (2) memoranda regarding the scope of his work for the NYPD; and (3) the text of any protests he submitted to the NYPD when it declined to renew his contract. Plaintiff has failed to demonstrate any relevance with respect to the first and third demands. The motion is granted, however, with respect to memoranda regarding the scope of his work. Gannalo's affirmative defense alleges that his statements regarding plaintiff were made in the course of his duties performed for the NYPD, and (presumably) are subject to a qualified privilege. Therefore, documents regarding the scope of Gannalo's duties may be relevant and should be produced.

The Cross Motion

Plaintiff's bill of particulars includes references to allegedly defamatory statements by defendant that are not alleged in the complaint, to wit, the above-described written statements of April 5, 2004, and July 1 and July 8, 2004, as well as oral statements summarizing or supporting those written statements. Those statements, both written and oral, are not a proper part of this action, inasmuch as plaintiff failed to plead them in his complaint. Accordingly, it hereby is

ORDERED that that branch of plaintiff's motion that seeks to amend the complaint is denied; and it further is

ORDERED that that branch of plaintiff's motion that seeks to compel discovery is granted to the extent that Gannalo shall produce documents describing the scope of his duty owed to the NYPD, and otherwise is denied; and it further is

ORDERED that plaintiff's time to file and serve a motion of issue is extended to October 1, 2007; and it further is

ORDERED that the cross motion is granted to the extent that the references in the response to Question number 2 to written statements of April 5, 2004, and July 1 and July 8, 2004, and to oral statements summarizing or supporting those written statements, are stricken.

Dated: August 10, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

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AUG 14 2007
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