

**Brinson v Geismar**

2007 NY Slip Op 34328(U)

December 31, 2007

Supreme Court, Nassau County

Docket Number: 0084-07/

Judge: Karen Veronica Murphy

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Short Form Order

**SUPREME COURT - STATE OF NEW YORK  
TRIAL TERM, PART 25 NASSAU COUNTY**

**PRESENT:**

**Honorable Karen V. Murphy**  
**Justice of the Supreme Court**

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**JAMES R. BRINSON, JR.,**

**Index No. 000084/07**

**Plaintiff,**

**-against-**

**Motion Dated: 6/11/07**  
**Motion Submitted: 9/27/07**  
**Motion Sequence: 002**

**STEVEN GEISMAR, President "PACOA, INC."  
and PAINT APPLICATOR CORP. OF AMERICA,  
d/b/a "PACOA",**

**Defendants.**

\_\_\_\_\_ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....XXX
- Reply.....XX
- Briefs: Plaintiff's/Petitioner's.....X
- Defendant's/Respondent's.....X

This motion by defendants Steven Geismar, President "PACOA, Inc." and Paint Applicator Corp. of America, d/b/a "PACOA" for an Order pursuant to CPLR § 3211(a)(7) dismissing the amended complaint for failure to state a cause of action is granted.

In this action commenced on January 5, 2007, plaintiff sought to recover for negligence, breach of contract and slander. Punitive damages were also sought. By Order dated April 9, 2007, this Court granted defendants' motion to dismiss plaintiff's complaint. The breach of contract claim was dismissed pursuant to the Statute of Frauds (see General Obligations Law § 5-701[a][1]);

the cause of action for negligence was dismissed as duplicative. (*Clark-Fitzpatrick v. Long Is. R.R. Co.*, 70 N.Y.2d 382, 389, 516 N.E.2d 190, 521 N.Y.S.2d 653 (1987), and the claim for punitive damages was stricken. (*Rupert v. Sellers*, 48 A.D.2d 265, 368 N.Y.S.2d 904 [4<sup>th</sup> Dept., 1975]). The slander and defamation claim was dismissed pursuant to CPLR § 3016(a), with leave to replead, as the complaint did not set forth “the actual words, the time and place of publications, and the identity of the person to whom it was published.”

On or about May 1, 2007, plaintiff served an Amended Complaint in which he advanced causes of action for libel and slander and negligence against PACOA premised upon its negligent training and supervision of its employees, namely the individual defendant Steven Geismar. In his cause of action for libel and slander, plaintiff alleges that for a six month period during PACOA’s relocation to Port Washington, defendant slandered him to his co-workers stating that he was “bad news,” “a crack head,” “uses drugs,” “corrupt,” and told others “Don’t trust [him] with money,” “look out for him because [he] might do something to the company,” and “to get rid of him as soon as possible.”

Defendants again seek dismissal pursuant to CPLR § 3211(a)(7).

“[O]n a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine whether, accepting as true the factual averments of this [pleading] and according the [non-moving party] the benefits of all favorable inferences which may be drawn therefrom, the [proponent of the pleading] can succeed upon any reasonable view of the facts stated (citation omitted).” (*City Line Rent A Car, Inc. v. Alfess Realty, LLC*, 33 A.D.3d 835, 823 N.Y.S.2d 214 [2d Dept., 2006]). “The court must determine whether the alleged facts fit any cognizable legal theory. The standard is not whether the complaint states a cause of action, but whether the plaintiff has a cause of action (citations omitted).” (*Morales v. Copy Right, Inc.*, 28 A.D.3d 440, 440-441, 813 N.Y.S.2d 731 (2d Dept., 2006), *lv den.*, 7 N.Y.3d 705, 853 N.E.2d 244, 819 N.Y.S.2d 873 [2006]).

In his Amended Complaint, the plaintiff has still failed to set forth the alleged time and place of publication and the identity of the person to whom the statements were published. In attempting to avoid a second dismissal of his defamation claim, in opposition to this motion the plaintiff now alleges: “[o]n January 13, 2006, while working at PACOA Inc., I was informed by Scott Kempf that the defendant Geismar made defamatory statements to Kathy Kempf, Flo Gross and Herb Geismar as early as September, 2005.”

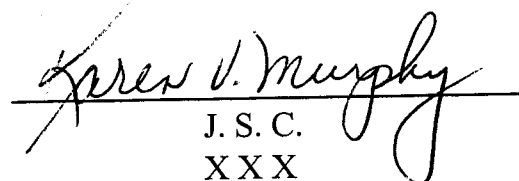
Giving the plaintiff every benefit of the doubt, and taking into account the exhibits he has submitted in opposition to this motion, he has still failed to set forth the elements required to sustain a defamation claim. While he has set forth the alleged defamatory statements, he has failed to allege "the **time, place** and manner of the false statement and to specify to whom it was made (emphasis added)." (*Dillon v. City of New York*, 261 A.D.2d 34, 38, 704 N.Y.S.2d 1 (1<sup>st</sup> Dept., 1999); *see also, Arsenault v. Forquer*, 197 A.D.2d 554, 602 N.Y.S.2d 653 (2d Dept., 1993); *Buffolino v. Long Is. Sav. Bank*, 126 A.D.2d 508, 510 N.Y.S.2d 628 (2d Dept., 1987); *Geddes v. Princess Props. Intl.*, 88 A.D.2d 835, 451 N.Y.S.2d 150 [1<sup>st</sup> Dept., 1982]). In fact, the plaintiff has refused to fulfill this requirement despite this motion and this Court's cautionary instruction in its prior Order.

Assuming, *arguendo*, the statement made by plaintiff in his attempt to avoid dismissal rendered his pleading satisfactory under CPLR § 3016(a), his defamation claim would be untimely and nevertheless be dismissed pursuant to CPLR § 3211(a)(7). In opposition to this motion, the plaintiff alleges that the defendant made defamatory statements to Kathy Kempf, Flo Gross and Herb Geismar as early as September 2005. This action was commenced on January 5, 2007. The Statute of Limitations for defamation is one year. CPLR § 215(3). A cause of action for defamation accrues upon the statement's initial publication and the statute of limitations does not begin to run anew with each successive publication. (See, *Hoesten v. Best*, 34 A.D.3d 143, 150, 821 N.Y.S.2d 40 (1<sup>st</sup> Dept., 2006), *citing Gelbard v. Bodary*, 270 A.D.2d 866, 706 N.Y.S.2d 801 (4<sup>th</sup> Dept., 2000), *lv den.*, 95 N.Y.2d 756, 734 N.E.2d 760, 712 N.Y.S.2d 448 (2000); *see also, Drakes v. Rulon*, 6 Misc.3d 1025(A), 800 N.Y.S.2d 345 [Sup.Ct. Kings Co., 2005]). Accordingly, assuming, *arguendo*, that plaintiff's defamation claim was accurately pled, it is untimely.

Plaintiff's negligence cause of action was dismissed with prejudice pursuant to this court's prior order. It has been improperly replead and is again dismissed.

The foregoing constitutes the Order of this Court.

Dated: December 31, 2007  
Mineola, N.Y.

  
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J. S. C.  
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