Aretakis v Coffey
2008 NY Slip Op 31718(U)
June 17, 2008
Supreme Court, New York County
Docket Number: 0111564/2007
Judge: Edward H. Lehner
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SCANNED ON 6/20/2008

[* 1]

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

PRESENT: EDWARD H. LEHNER Justice

PART 19

ARETAKIS

- v -

COFFEY

INDEX NO. 111564/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance with accompanying memorandum decision

FILED
JUN 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: JUN 17 2008

J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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JOHN A. ARETAKIS,

Plaintiff,

INDEX NO.
111564/07

- against -

STEPHEN R. COFFEY,

Defendant.

----------x

FILED
JUN 20 2008
COUNTY CLERK'S OFFICE
NEW YORK

EDWARD H. LEHNER, J.;

Before the court is a motion by defendant to dismiss the complaint pursuant to i) CPLR 3211(a) 5, relying on the one-year statute of limitations, and ii) 3012(b), based on an asserted untimely service of the complaint. Plaintiff has cross-moved to require defendant to accept his complaint. Since, at most, the complaint was served a week late, and there is a public policy favoring the determination of claims on the merits, the cross-motion is granted and the branch of defendant's motion seeking dismissal under § 3012(b) is denied.

Although defendant's motion for dismissal under § 3211(a) 5 is based on the statute of limitations, the parties have treated the motion at oral argument and in the papers as one under 3211(a) 7 and the court will rule on such basis (see tr. 4). Regarding the statute of limitations, the court cannot determine from the face of the

complaint whether any of the causes of action are untimely. Hence, the application to dismiss on such grounds is denied without prejudice.

CPLR 3016(a) requires that in "an action for libel or slander, the particular words complained of shall be set forth in the complaint." In the First cause of action, plaintiff alleges that on May2, 2007 and May 3, 2007, defendant stated to an Albany County assistant district attorney that plaintiff "is placing hysteria and lies into and about this case and is doing that to generate publicity for himself" (§ 18), and further alleges that the statement was made "in an intentional effort to harm and damage the plaintiff in his business and profession" (§ 21). Since plaintiff has failed to state any other specific words asserted to be slanderous, and also failed to state to whom, when and where the other allegedly slanderous statements were made, the other allegations of the First cause of action are not actionable for failure to comply with § 3016(a). See, Fusco v. Fusco, 36 AD3d 589, 590 (2nd Dept. 2007); Khan v. Duane Reade, 7 AD3d 311, 312 (1st Dept. 2004).

With respect the above-quoted words, defendant asserts that dismissal is warranted because they were privileged as words spoken to a law enforcement official. However, any such privilege is qualified [see, Present v. Avon Products, Inc., 253 AD2d 183, 188 (1st Dept. 1999)], and thus dismissal is not warranted on that ground because plaintiff has adequately alleged that the statements were made

maliciously. See, Chase V. Grilli, 127 AD2d 728 (2nd Dept. 1987).

Although plaintiff has not alleged special damages, he argues that such allegation is unnecessary as he is asserting a slander per se claim, maintaining that the alleged statement purportedly damaged him in his profession as a lawyer. In Clemente v. Impastato, 274 AD2d 771 (3rd Dept. 2000), the court summarized the law with respect to a claim of libel per se, as follows (p. 773):

> While publication of an untrue statement may be defamatory per se if it imputed incompetence, incapacity or unfitness in the performance of one's profession, it must amount to an attack on plaintiff's professional ability and be more than a general reflection upon plaintiff's character or qualities and must suggest improper performance of one's duties or professional conduct. (citations omitted)

The court finds that the quoted material, which does not specify any misstatement by defendant and merely asserts that he is seeking publicity, does not constitute such an attack on plaintiff in his profession as to constitute a slander per se. Hence, without an allegation of special damages, the First cause of action is dismissed.

In the second cause of action, plaintiff complains of a letter to an Albany County judge that states: "Mr. Aretakis is lucky he is personally protected from his outrageous and slanderous remarks. With regard to his ethics, that is another matter." The court finds that the said letter to a judge in connection with pending litigation is absolutely privileged. "The privilege embraces anything that may possibly be pertinent or which has enough appearance of connection with the case ... (and) [t]he

test of pertinence is extremely liberal, the offending statements need be neither relevant nor material to the threshold degree required in other areas of the law, and the barest rationality, divorced from any palpable or pragmatic degree of probability, suffices" [Pomerance v. McTiernan, ___ AD3d ___, NYLJ, May 22, 2008, p. 33, c. 1 (1st Dept.)]. The issue of pertinence "is a question of law for the court" [Sexter & Warmflash v. Margrave, 38 AD3d 163, 173 (1st Dept. 2007)]. Moreover, as with the statement referred to in the First cause of action, the letter does not constitute a libel per se and the absence of allegations of special damages warrants dismissal of the cause of action.

The Third, Fourth, Fifth, Seventh and Eighth causes of action each fail to state a cause of action as plaintiff does not specify therein the specific words allegedly uttered, nor in the Fourth, Fifth and Eighth causes of action does he state when, where and to whom the offensive words were spoken.

The allegations in the Sixth cause of action fail to state a viable claim for intentional infliction of emotional distress as such a claim "predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" [Freihofer v. Hearst Corporation, 65 NY2d 135, 143 (1985)]. The words quoted here do not meet these requirements, which are "rigorous and difficult to satisfy." [Howell v. The New

York Post Company, Inc., 81 NY2d 115, 122 (1993)]. Nor does the cause of action set forth a viable claim for negligent infliction of emotional distress. See, Wolkenstein v. Morgenstern, 275 AD2d 635, 636-637 (1st Dept. 2000); Hernandez v. City of New York, 255 AD2d 202 (1st Dept. 1998).

In light of the foregoing, the motion of defendant to dismiss the complaint is granted and the Clerk shall enter judgment accordingly.

Dated: June 17, 2008

J.S.C.

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