

Cullen v Town of Greenville

2008 NY Slip Op 32863(U)

October 21, 2008

Supreme Court, Greene County

Docket Number: 08-0507

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF GREENE

PATRICK CULLEN and CYNTHIA CULLEN,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 08-0507
RJI NO. 19-08-3826

THE TOWN OF GREENVILLE, ALDO CARDAMONE,
individually and in his official capacity, and WAYNE
NELSON, individually and in this official capacity,

Defendants.

Supreme Court Greene County All Purpose Term, October 10, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Law of Office of Thomas M. Gambino & Associates
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TERESI, J.:

Plaintiffs commenced this proceeding by filing a Summons with Notice on March 26, 2008. Defendants duly appeared and demanded a complaint. Plaintiffs served their Verified Complaint, which sets forth causes of action sounding in “libel”, “libel per se”, “slander”, “slander per se”, “intentional infliction of emotional distress”, “caused plaintiffs to be in fear” and “endangerment of plaintiffs’ physical safety”. Prior to answering, defendants move to dismiss the Verified Complaint, pursuant to CPLR §3211, alleging plaintiffs’ failed to timely

serve a Notice of Claim, commenced this action after the statute of limitations had expired and failed to state a cause of action. Plaintiffs oppose the motion and, in the event the defendants' motion is granted, move to amend their complaint. Because plaintiffs failed to timely commence this action within the applicable statute of limitations period, defendants' motion to dismiss is granted.

“When a party moves pursuant to CPLR §3211(a)(5) for a judgment dismissing a claim on the ground that it is barred by the Statute of Limitations, it is that party's burden initially to establish the affirmative defense by prima facie proof that the Statute of Limitations had elapsed.” (Hoosac Valley Farmers Exchange, Inc. v. AG Assets, Inc., 168 AD2d 822, 823 [3d Dept. 1990], Gravel v. Cicola, 297 A.D.2d 620 [2d Dept. 2002]). The moving party need not negate all exceptions to the statute of limitations and once the movant makes their prima facie showing, the burden “shifts to the party opposing the motion to aver evidentiary facts establishing that the case at hand falls within such exceptions.” (Hoosac Valley Farmers Exchange, Inc., supra, Doyon v. Bascom, 38 A.D.2d 645 [3d Dept. 1971]).

CPLR §215(3), states, in part: “[t]he following actions shall be commenced within one year: an action to recover damages for... libel, [or] slander...” Likewise, an action sounding in “intentional infliction of emotional distress” is limited by the one year period of CPLR §215(3). (Bardi v. Warren County Sheriff's Dept., 260 AD2d 763 [3 Dept. 1999]). Similarly, while “New York does not recognize a common law cause of action alleging harassment” (Mago, LLC v. Singh, 47 AD3d 772, 773 [2d Dept. 2008]), the Verified Complaint's causes of action stating that defendants “caused plaintiffs to be in fear” and “endanger[ed]... plaintiffs' physical safety”, assuming without deciding they are cognizable claims, sound in the nature of an intentional tort.

(Rutzinger v. Lewis, 302 AD2d 653 [3d Dept. 2003]). Again, the “one year statute of limitations contained in CPLR §215(3) [is] applicable to intentional torts.” (Id. at 655).

Plaintiffs commenced this action on March 26, 2008. As such, to avoid dismissal due to the expiration of the statute of limitations, defendants’ alleged libel, slander, intentional infliction of emotional distress, their alleged “caus[ing] plaintiffs to be in fear” and their alleged “endanger[ing]... plaintiffs’ physical safety” must have occurred after March 26, 2007.

Here, the plaintiffs’ complaint itself sets forth no dates for the defendants’ alleged misconduct. Rather, the Verified Complaint attaches what appear to be eight undated newspaper articles, an undated sign, a compilation of signatures dated April 21, 2006, a letter from the Town of Greenville, dated October 24, 2006, a newspaper article published in the May 11, 2006 edition of The Daily Mail and a newspaper article published in the June 8, 2006 edition of The Metroland. Plaintiffs’ Verified Complaint provides no further details about the defendants’ alleged offending conduct, and no allegations of fact are set forth as occurring within the statute of limitations period. Moreover, defendants also submitted plaintiffs’ Notice of Claim, dated February 22, 2007, which specifically alleged that defendants’ wrongful conduct occurred on May 19, 2006 and April 4, 2006. Again, such claims fall outside of the applicable statute of limitations period. As more than one year elapsed from defendants’ alleged wrongful conduct to the commencement of this action, defendants demonstrated their prima facie entitlement to dismissal of the Verified Complaint due to the expiration of the statute of limitations.

In opposition, plaintiffs set forth no factual allegations to rebut defendants’ showing. Rather, plaintiffs rely upon the language of their Notice of Claim which states that their claim is “continuing through the present” and the Verified Complaint’s language which states their claim

is “continuing each and every day thereafter”. Such reliance is misplaced, for plaintiffs fail to set forth “evidentiary facts” to rebut plaintiffs’ prima facie entitlement to dismissal of the Verified Complaint. (Hoosac Valley Farmers Exchange, Inc., supra). While plaintiffs aver that their causes of action are continuing, “the complaint fails to set forth a continuing course of conduct with sufficient particularity to establish the existence of a continuing tort”. (Demas v. Levitsky, 291 AD2d 653, 659 [3d Dept. 2002]).

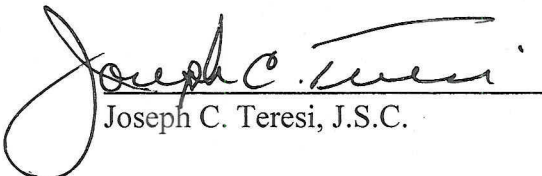
Accordingly, plaintiffs’ Verified Complaint is dismissed due to the expiration of the statute of limitations on their claims, prior to commencement of the action herein. As such, this Court need not reach plaintiffs’ further grounds for dismissal.

Plaintiffs’ cross-motion to amend their complaint pursuant to CPLR §3211(e) is denied. The language of CPLR §3211(e) quoted in plaintiffs’ cross motion, which allows a party opposing a CPLR §3211 motion to re-plead, was removed by the legislature in 2005. (2005 Sess. Law News of N.Y. Ch. 616 [S. 4019][McKinney’s][effective January 1, 2006]). Accordingly, plaintiffs’ set forth no basis for their motion to re-plead, which is denied.

All papers, including this Decision and Order are being returned to the attorneys for defendants. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: October 21, 2008
 Albany, New York


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated August 25, 2008, Affirmation of M. Randolph Belkin, dated August 25, 2008 with attached Exhibits "A" and "B".
2. Notice of Cross-Motion, dated September 27, 2008, Affirmation in Opposition to Defendants' Motion and in Support for Plaintiffs' Cross-Motion of Thomas Gambino, dated September 27, 2008 with attached Exhibits 1-2.
3. Reply and Responding Affirmation of M. Randolph Belkin, dated October 9, 2008.