

**Greenky v Toussaint**

2009 NY Slip Op 30214(U)

January 9, 2009

Supreme Court, New York County

Docket Number: 603184/07

Judge: Joan A. Madden

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

PRESENT: Hon. Judge A. Middle

PART 11

Index Number : 603184/2007  
**GREENKY, SETH**  
vs.  
**TOUSSAINT, SALLIE**  
SEQUENCE NUMBER : 001  
DISMISS ACTION

INDEX NO. \_\_\_\_\_

MOTION DATE 9-25-08

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

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 is decided in accordance with the annexed Memorandum Decision + Order.

**FILED**  
JAN 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: January 9, 2009

[Signature]  
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: PART 11

-----X  
SETH GREENKY d/b/a GREEN KEY MANAGEMENT,

Plaintiff,

INDEX NO.603184/07

-against-

SALLIE TOUSSAINT and ROCHELLE S. AYLES,

Defendants

-----X  
JOAN A. MADDEN, J.:

Defendant Rochelle S. Ayles ("Ayles") moves for an order dismissing the complaint against her and granting sanctions against plaintiff. Plaintiff Seth Greenky d/b/a/ Green Key Management, LLP ("Greenky") opposes the motion and cross moves to disqualify Ayles' counsel. For the reasons below, the motion is granted to the extent of dismissing the claims against Ayles, and the cross motion is denied.

**FILED**  
JAN 20 2009

**BACKGROUND**  
COUNTY CLERK'S OFFICE  
NEW YORK

This is the fourth action commenced by Greenky against Ayles who is an actor. The first three actions related to Ayles' termination of Greenky as Ayles personal manager in 2005 after the expiration of the first term of a personal management agreement between Greenky and Ayles. Ayles sought to arbitrate the dispute pursuant to an arbitration clause in the agreement. While the arbitration was pending, Greenky commenced two actions seeking damages for breach of contract, which were stayed by the Appellate Division, First Department pending resolution of the arbitration.<sup>1</sup> Greenky then initiated another action seeking to "limit the scope of the

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<sup>1</sup>By interim award dated August 22, 2007, the arbitrator found that the personal management agreement between the parties was effectively terminated by Ayles as of April 8, 2005 and that neither party had any obligations to the other under the Agreement or in connection with it as it related to transactions or events occurring after the termination date. The arbitrator noted that he made no determination regarding any damages that might be owed by either party

arbitration," which was dismissed.

In this action, Greenky sues Aytes for defamation and tortious interference with contract, based on statements Aytes allegedly made about Greenky to defendant Sallie Toussaint ("Toussaint"),<sup>2</sup> an actor who was also represented by Greenky.

The second cause of action, for defamation, alleges that, "in or about 2006, defendant Aytes stated to and/or told defendant Toussaint, in sum and substance, as follows:

- a. that the plaintiff had not discovered Aytes on the subway;
- b. that plaintiff had not arranged for Aytes to take acting classes
- c. that the plaintiff had nothing to do with Aytes obtaining her role in the motion picture entitled 'White Chicks'
- d. that plaintiff was unprofessional in managing Aytes' career;
- e. that plaintiff had 'bizarre personal behavior;'
- f. that plaintiff had a lasting and damage effect on Aytes' career;
- g. that plaintiff had 'taken in' and 'conned Aytes and several other artists.'

It is further alleged that these words were malicious and intended to damage Greenky in his profession, and caused injury to his professional standing.

The third cause of action for tortious interference with contract alleges that the

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prior to the termination date and permitted either party to pursue the issue. It appears from the record that the parties are conducting discovery with respect to whether Aytes owes Greenky any commissions for transaction or events occurring prior to the termination date.

<sup>2</sup>The first cause of action against Toussaint is for defamation in connection with statements Toussaint allegedly made about Greenky on an internet website known as MySpace.com. Toussaint who has interposed an answer and asserted counterclaims against Greenky, does not submit any papers in connection with the motion and cross motion.

defamatory statements made by Aytes were intended to induce Toussaint to end her contractual relationship with Greenky, and that as a result of Aytes' interference in or about October 2006, Toussaint breached and/or attempted to terminate her Personal Management Agreement with Greenky.

Aytes now moves to dismiss the complaint against her, asserting that the defamation claim is not pleaded with sufficient particularity as it does not include the defamatory words allegedly uttered by Aytes or the time, date or manner of the allegedly defamatory statements. Aytes also asserts that the statements are not defamatory but are non-actionable opinion, and that the only factual statements noted in the complaint have no defamatory meaning.

As for the tortious interference claim, Aytes asserts that it must be dismissed as it fails to allege that "but for" Aytes' statements Toussaint would not have breached of her personal management contract with Greenky. Furthermore, Aytes contends that the allegations in the first cause of action relating to the statements made by Toussaint about Greenky demonstrate that she had ample independent reasons, without Aytes' encouragement, to terminate her contract with Greenky.

Aytes also argues that given the frivolous nature of the claims against Aytes and the history of baseless litigation commenced by Greenky against Aytes, Greenky should be sanctioned pursuant to 22 NYCRR Part 130.

In opposition, Greenky submits an affidavit submitted by Toussaint in an unrelated action which provided the basis for the allegations in the complaint. In the affidavit, Toussaint paraphrases statements made to her by Aytes at an unidentified time or place. Greenky argues that the statements made by Aytes are defamatory as they would tend to "induce an evil opinion

of [Greenky] in the minds of right-thinking persons, and to deprive [Greenky] of friendly intercourse in society.." Foster v. Churchill, 87 NY2d 744, 751 (1996)(internal quotations omitted).

Greenky next argues that the tortious interference claim pleads all the required elements of the tort since it alleges the existence of a valid contract with Toussaint, Aytes' knowledge of the contract with Toussaint, Aytes' improperly procuring of its breach and damages.

Greenky opposes the Aytes' request for sanctions asserting that such request is a litigation tactic designed to obfuscate Aytes' wrongdoing.

Greenky cross moves to disqualify Aytes' counsel, Pryor Cashman, on the ground that the firm represented him for 36 years, during which time he consulted with several lawyers in the firm. Greenky states the firm represented him in connection with two screen plays he wrote, and that he promoted these screenplays to Aytes when she was under contract with his company, and that he last contacted Pryor Cashman via email in March 2005, although he is not certain as to the text or subject matter of the email. In his affidavit Greenky avers that "[through its representation and contacts with me, Pryor Cashman has acquired information about myself, my business, my plans, my strategies, my personal makeup, and how I conduct myself. I am concerned that these confidences acquired during 36 years of representation will be used against me and to Ms. Aytes' advantage in this litigation." (Greenky affidavit, ¶ 8). Greenky further asserts that Pryor Cashman's representation of National Conference of Personal Managers of which he is a member also creates a conflict of interest warranting the firm's disqualification.

In reply, Aytes, through affirmation of her counsel, opposes the cross-motion for disqualification of her attorneys, asserting that Pryor Cashman last represented Greenky in 1994

in an attempt to market his screenplays and these efforts, which were unsuccessful, are unrelated to his management business at issue in this action. Moreover, Aytes asserts that the attempted email in March 2005 is insufficient to establish an attorney-client relationship. In addition, Aytes contends that Pryor Cashman's prior representation of an organization of which Greenky is a member does not demonstrate that the firm has any knowledge potentially related to this action. Aytes further asserts that Greenky should be estopped from seeking Pryor Cashman's disqualification since the firm has appeared on her behalf in litigation and arbitration adverse to Greenky since April 2006, and in none of these matters has Greenky sought to disqualify the firm.

## DISCUSSION

### Motion to Dismiss

On a motion pursuant to CLR 3211 (a) (7), the court is limited to ascertaining whether the pleading states any cause of action and not whether there is evidentiary support for the complaint (Guggenheimer v Ginzburg, 43 NY2d 268 [1977]). The complaint must be liberally construed in the light most favorable to the plaintiff, and all factual allegations must be accepted as true (id.; Morone v Morone, 50 NY2d 481 [1980]). Affidavits and other evidence submitted by plaintiff may be considered for the limited purpose of remedying any defects in the complaint and thus preserving inartfully pleaded, but potentially meritorious claims (Rovello v Orofino Realty Co., Inc., 40 NY2d 633 [1976]). Despite this liberal standard, the claims against Aytes must be dismissed for the reasons below.

The elements for a claim for defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum a

negligence standard, and, it must either cause special harm or constitute defamation per se.”

Dillon v. City of New York, 261 AD2d 34, 38 (1<sup>st</sup> Dept 1999) (citation omitted). CLR 3016 (a) also requires that in a defamation action “the particular words complained of be set forth in the complaint.” Id. This pleading “requirement is strictly enforced and the exact words must be set forth. Any qualification in the pleading thereof or use of the words ‘to the effect’ ‘substantially’ or words of similar import generally renders the complaint defective.” Gardner v. Alexander Rent-a-Car, Inc., 28 AD2d 667, (1<sup>st</sup> Dept 1967); Varela v. Investors Ins. Holding Corp., 185 AD2d 309, 310 (2d Dept 1992), aff’d, 81 NY2d 958 (1993)(“[t]he requirement that the defamatory words must be quoted verbatim is strictly enforced).. A claim for defamation must also allege “the time, place and manner of the publication.” Kahn v. Reade, 7 AD3d 311, 312 (1<sup>st</sup> Dept 2004)

In this case, the complaint does not satisfy the pleading requirements of CLR 3016(a) since the exact words complained of are not contained in the complaint. In fact, the complaint prefaces its description of the alleged statements with the phrase “in sum and substance” thus rendering the complaint defective. Moreover, Greenky’s submission of Toussaint’s affidavit from an unrelated action which provided the basis for defamation claim is insufficient to remedy the defective pleading since it is evident from the affidavit that Toussaint was paraphrasing statements made during a conversation with Aytes. See Smalley v. Dreyfus Corp., 40 AD3d 99, 107 (1<sup>st</sup> Dept 2007), rev’d on other grounds, 10 NY3d 55 (2008)(where statements on which plaintiffs base their claim are paraphrased they do not meet the minimum requirements of CPLR 3016(a)); Varela v. Investors Ins. Holding Corp., 185 AD2d at 310 (dismissing complaint for defamation where neither the complaint nor the papers annexed thereto “set forth the particular

words complained of” as required by CPLR 3016(a)).

The complaint is also defective as it fails to adequately allege where and when Aytes allegedly uttered the purportedly defamatory statements but, instead, simply alleges that the statements were made “in or about 2006” and were stated or told to Toussaint. Kahn v. Reade, 7 AD3d at 312(reversing denial of motion to dismiss defamation claim where time, place and manner of publication was not alleged). Thus, as the second cause of action does not sufficiently plead a claim for defamation, it must be dismissed and the court need not address Aytes’ alternative argument that statements in the complaint are not defamatory.

Greenky has also failed to start a cause of action against Aytes for tortious interference with contract. To establish a claim alleging tortious interference with contract a plaintiff must plead: 1) the existence of a valid contract, 2) defendants’ knowledge of the contract, 3) defendants’ intentionally procuring of a breach of the contract, 4) actual breach of the contract, and 5) damages. See Foster v. Churchill, 87 NY2d at 749-750. In particular, “plaintiff must allege that the contract would not have been breached ‘but for’ the defendant’s conduct.” Burrowes v. Combs, 25 AD3d 370, 371 (1<sup>st</sup> Dept), lv denied, 7 NY3d 704 (2006) (citation omitted). In addition, while on a motion to dismiss the pleadings are construed liberally, “to avoid dismissal of a tortious interference with contract claim a plaintiff must support his claim with more than mere speculation.” Id. (citation omitted).

Here, Greenky has failed to sufficiently plead that “but for” the allegedly defamatory statements made by Aytes to Toussaint, Toussaint would not have breached the Personal Management Contract with him, and there are insufficient allegations in the complaint or support in the record to support Greenky’s theory that Toussaint terminated her contract with Greenky as

a result of the statements made by Aytes. In fact, in Toussaint's affidavit submitted in opposition to the dismissal motion, Toussaint indicates that she terminated Greenky based on his job performance. Accordingly, the motion to dismiss the tortious interference claim must be granted.

Cross Motion to Disqualify Pryor Cashman

"Disqualification of a law firm during litigation implicates not only the ethics of the profession but also the substantive rights of the litigants. Disqualification denies a party's right to representation by the attorney of its choice. . . ." S & S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437, 443 (1987)(citations omitted). Moreover, this court is mindful that disqualification motions "are often used as a litigation tactic 'inflicting hardship on the current client and delay upon the courts by forcing disqualification even though the client's attorney is ignorant of any confidences of the prior client.'" Talvy v American Red Cross in Greater New York, 205 AD2d 143, 148 (1<sup>st</sup> Dept 1994), aff'd 87 NY2d 826 (1995).

"[A] party seeking to disqualify an attorney or a law firm on the ground of prior representation must establish '(1) the existence of a prior attorney-client relationship and (2) that the former and current representations are both adverse and substantially related.'" Id. (quoting Solow v W.R. Grace & Co., 83 NY2d 303, 308 (1994); see also, DR 5-108. In this case, Greenky has not established that any prior attorney-client relationship with Pryor Cashman was adverse or substantially related to the instant action, and Greenky's statements that the firm is familiar with his business, strategies and personal makeup by virtue of its representation of him does not provide a basis for disqualification. Notably, while Greenky alleges that Pryor Cashman represented him for 36 years, the only matter he specifically mentions is Pryor Cashman's representation of him in connection with two screen plays in 1994. However, Greenky does not

explain how the representation is adverse or substantially related to the instant action.

Accordingly, the cross motion is denied.

Finally, Aytes' request for sanctions must be denied. Although there is a history of litigation between the parties, this action does not directly relate to such litigation. In addition, while the claims against Aytes have been dismissed they are not clearly without merit in law or fact so as to warrant an award of sanctions.

### CONCLUSION

In view of the above, it is

ORDERED that the motion to dismiss by defendant Rochelle S. Aytes is granted; and it is further

ORDERED that the second and third causes of action are severed and dismissed and it is further

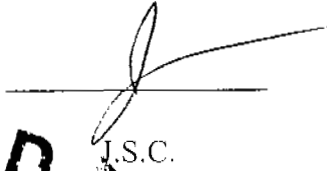
ORDERED that the first cause of action against defendant Sallie Toussaint shall continue; and it is further

ORDERED that the remaining parties shall appear for a compliance conference in Part 11, room 351, 60 Centre Street, New York, NY on February 19, 2009 at 9:30 am.

ORDERED that the request for sanctions by defendant Rochelle S. Aytes is denied.

A copy of this decision and order is being mailed by my chambers to counsel for the parties.

DATED: January 9, 2009

  
J.S.C.  
**FILED**  
JAN 20 2009  
COUNTY CLERK'S OFFICE  
NEW YORK