AVGraphics, Inc. v NYSE Group, Inc.
2009 NY Slip Op 30623(U)
March 20, 2009
Supreme Court, New York County
Docket Number: 106997/08
Judge: Edward H. Lehner
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SCANNED ON 3/25/2009

[* 1]

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

PRESENT: EDWARD H. LEHNER
Justice

PART 19

AV Graphics

- v -

N48E Group

INDEX NO. 106997/08

MOTION DATE

MOTION SEQ. NO. 004

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
MAR 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: MAR 20 2009

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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AVGRAPHICS, INC., JEAN PIERRE
AZOULAY and DARIA MCDERMOTT,

Plaintiffs,

Index No.: 106997/08

-against-

NYSE GROUP, INC. (successor in interest to New York Stock Exchange, Inc.), NEW YORK STOCK EXCHANGE, INC., JOHN GREGORETTI, TONY WALENTY, SAM COCOZZA, MARGARET DeB. TUTWILER, JOHN THAIN, individually and as employees of NYSE GROUP, INC., ANTHONY E. WILSON, a/k/a TONY WILSON, DANA GREGORETTI, and E-TRADE SECURITIES LLC,

Defendants.

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FILED
MAR 25 2009
COUNTY CLERK'S OFFICE
NEW YORK

EDWARD H. LEHNER, J.:

BACKGROUND

In motion sequence number 005, defendants Anthony E. Wilson a/k/a Tony Wilson (Wilson) and Dana Gregoretti (Dana)(daughter of co-defendant John Gregoretti), move, pursuant to CPLR 3211 and 3016 (a), to dismiss the complaint against them.

The facts of the case have been detailed in this court's decision with respect to motion sequence number 004, and need not be reiterated in detail here. Wilson and

Dana had originally moved to dismiss for lack of personal jurisdiction based on ineffective service of process, but service was subsequently cured and movants have conceded proper service (tr. p. 3).

Plaintiffs have asserted three causes of action against Wilson and Dana: (1) tortious interference with contract between AVGRaphics, Inc. (AVGgraphics) and its employees by improper solicitation of those employees; (2) tortious interference with contract between AVGraphics and the New York Stock Exchange, Inc. (NYSE); and (3) defamation.

At the time of the alleged occurrences, both movants were employed by AVGRaphics, Wilson as director of audio services, and Dana as a graphic artist. Wilson and Dana assert: that the cause of action for defamation must be dismissed because New York lacks long-arm jurisdiction over them, the complaint fails to state the alleged defamatory words, and the claim is time-barred; and that the causes of action for tortious interference with contract fail to state a claim. It is averred that Wilson and Dana are both currently residents of New Jersey, but admit that at the time of the alleged occurrence they were employed in New York and that Wilson is currently employed here.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the pleading should be liberally construed, the facts alleged by the plaintiff should be accepted as true, and

all inferences should be drawn in the plaintiff's favor (*Leon v Martinez*, 84 NY2d 83 [1994]). However, the court must determine whether the alleged facts "fit within any cognizable legal theory." *Id.* at 88. Further, "[a]llegations consisting of bare legal conclusions ... are not presumed to be true and accorded every favorable inference." *Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 (1st Dept 1999), *affd* 94 NY2d 659 (2000).

At the outset, the court concludes that it does have long-arm jurisdiction over Wilson and Dana. As noted above, at the time of the alleged occurrence Wilson was domiciled here, the alleged acts occurred here, and both movants were employed by AVGraphics at NYSE's offices in New York. In *Montgomery v Minarcin*, 263 AD2d 665, 667 (3rd Dept. 1999), it was stated:

> "CPLR 302 (a) (1) applies, inter alia, to a defendant, such as [Wilson], who is a domiciliary of this State at the time he commits one of the alleged acts, but is a non-domiciliary at the time of the lawsuit. Further, while defamation claims are excluded from CPLR 302's tort provisions, personal jurisdiction over a nondomiciliary defendant in a defamation action has been sustained under CPLR 302 (a) (1) where the action arises out of a defendant's transaction of business in New York. Plaintiff's maintenance of this defamation action against [Wilson and Dana] ... [nondomiciliaries] under CPLR 302 (a) (1) requires a showing that [they] engaged in purposeful activities within this State and demonstration of a substantial relationship between those activities and the causes of action ... ."
>
> Here, it is undisputed that all of the operative facts giving rise to the plaintiff's claims occurred in this State." [internal quotation marks and citations omitted]

Also, see generally, Copp v Ramirez, ___ AD3d ___, 2009 WL 439045, (1st Dept 2009).

Under the facts presented, since both Wilson and Dana were employed in New York and the acts complained of directly related to that employment, this court does have jurisdiction over them regarding the defamation claim, even though they both currently reside in New Jersey.

Wilson and Dana also assert that the defamation cause of action is time-barred. The complaint does not specify a date on which the statements were allegedly made, but it is assumed that they must have been made no later than December 14, 2006, the day plaintiff Jean Pierre Azoulay (Azoulay) was terminated because of information NYSE received about his alleged insider trading. The complaint avers that the defamatory statements related to Azoulay having engaged in such prohibited activities. Hence, since this action was not filed until May of 2008, more than one year had elapsed since the utterance of the alleged slander. The statute of limitations applicable to defamation claims is one year [CPLR 215 (3)]. However, on September 28, 2007, within the one-year statutory period, plaintiffs' filed an identical suit in federal court, which was dismissed for lack of jurisdiction, i.e., lack of complete diversity.

CPLR 205 (a) provides:

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> "[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff ... may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that the service upon defendant is effected within such six-month period."

The federal action was dismissed on March 28, 2008 without prejudice to refiling the action in state court, and the instant action was filed within two months thereafter. Therefore, the cause of action for defamation is not time-barred as § 205(a) applies [*Styllanou v. Incorporated Village of Old Field,* 23 AD3d 454 (2nd Dept. 2005)].

In order to maintain a cause of action for defamation, the claimant must allege in the complaint the particular words complained of and the time, place and manner in which the words were stated must be set forth clearly, and not paraphrased. *Manas v VMS Associates, LLC*, 53 AD3d 452, 454-455 (1st Dept. 2008); *Rosenberg v Home Box Office, Inc.*, 33 AD3d 550 (1st Dept 2006). Since the complaint fails to comply with the foregoing, the claim for defamation is dismissed.

The cause of action alleging tortious interference with contract relating to the solicitation of AVGraphics' employees has been discussed in this court's decision relating to motion sequence number 004. As stated in that decision, the AVGgraphics employees were all employees at will. In *Kronos, Inc. v AVX Corp.* (81 NY2d 90, 94

[1993]), the court stated the following as the elements necessary to maintain a claim for tortious interference of contract: "(1) the existence of a contract between plaintiff and a third party, (2) defendant's knowledge of the contract, (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible, and (4) damages to plaintiff."

Without a contract with a third party that was breached because of NYSE defendants' interference, plaintiffs cannot maintain this cause of action. *NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614 (1996). Also, as the court stated in *Bainton v Baran* (287 AD2d 317 [1st Dept 2001]), it is not possible to maintain an action for tortious interference with contract for services that are terminable at will. See also, *American Preferred Prescription, Inc. v Health Management, Inc.*, 252 AD3d 414, 417 (1st Dept. 1998); *Snyder v Sony Music Enterprises, Inc.*, 252 AD2d 294, 299 (1st Dept. 1999). Further, there is no allegation of "wrongful" conduct that would sustain a claim of interference with prospective contractual relations. See, *Guard-Life Corporation v S. Parker Hardware Manufacturing Corp.*, 50 NY2d 183, 191-194 (1980). Also, the complaint fails to indicate any damages resulting to plaintiffs from the alleged tortious interference, which alone would require dismissal. See, *Burrowes v Combs*, 25 AD3d 370 (1st Dept 2006).

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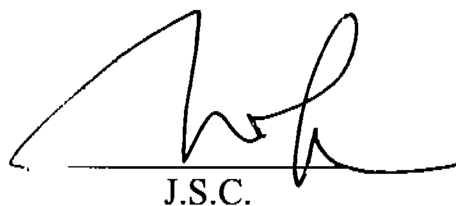
The other cause of action for tortious interference with contract alleges that movants tortiously interfered with the agreement between NYSE and AVGraphics. However, that contract, as renewed, expired by its terms on February 28, 2007, and no viable tortious conduct has been alleged against movants.

Based on the foregoing, it is

ORDERED, that the motion of Wilson and Dana Gregoretti to dismiss the complaint as against them is granted, and the Clerk is directed to enter judgment accordingly.

Dated: March 20, 2009



J.S.C.

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