

Sheng Gang Deng v Shag Qing Chen

2010 NY Slip Op 31198(U)

March 13, 2010

Supreme Court, New York County

Docket Number: 105363/2009

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 105363/2009
DENG, SHEN GANG
vs.
CHEN, SHAG QING
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE 10/20/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-3
4-7
8-9

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 by the*
attached Memorandum decision and order.

FILED
MAY 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/13/10

JANE S. SOLOMON 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: IAS PART 55

-----X
SHENG GANG DENG,

Plaintiff,

-against-

SHAG QING CHEN, WAI HUNG LAM and
FUNG CHUN CHOI,

FILED

MAY 18 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

Decision and Order

Index No.: 105363/09

Motion Seq. No.: 001

Jane Solomon, J.:

In this defamation action, defendants Shag Qing Chen (Chen), Wai Hung Lam (Lam), and Fung Chun Choi (Choi) (collectively, defendants) move to dismiss the complaint of plaintiff Sheng Gang Deng (Plaintiff) pursuant to CPLR 3016 (a) and 3211 (a) (7). Plaintiff opposes defendants' motion and cross-moves to amend his complaint pursuant to CPLR 3025 (b). Defendants oppose plaintiff's cross motion.

Plaintiff seeks to recover for statements allegedly made by defendants at two news conferences held on or about February 2, 2009 and February 24, 2009 at the headquarters of local 318 of the Chinese Restaurant Workers Union (respectively, the news conferences, the Union). During the relevant time period, plaintiff was employed as a supervisor at the Jing Fong restaurant (the Jing Fong), Chen and Lam, both members of the Union, were employed as waiters at the Jing Fong, and Choi was a vice-president of the Union.

Plaintiff's verified complaint, dated April 9, 2009 (Verified Complaint annexed as Exh. E to Motion) (the Initial Complaint), contains two causes of action - slander and slander per se. The Initial Complaint contains, in relevant part, the following pleaded allegations:

"During these news conferences defendants told the representatives of the Chinese newspapers that plaintiff had engaged in various abuses toward them when they attempted to get job assignments. Defendants stated that plaintiff had used underworld members to threaten workers who supported the union.

"Defendant Chen stated that plaintiff called in four big strong men who looked like underworld members. These men went to the restaurant to threaten him and other workers. Defendant Chen continued by stating that plaintiff said 'Tonight you'll be careful after work returning home you will be melted.'

"During the news conferences, defendants also stated that plaintiff had their personal information, including their telephone numbers and addresses, and it would be easy for him to do something bad against them."

Initial Complaint, ¶¶ 11, 12, 13.

The Initial Complaint also includes the following allegations relating to defendants' statements: they were published in "various Chinese language newspapers" (*id.*, ¶ 14); they were meant to and did refer to plaintiff (*id.*, ¶15); they were false and defamatory (*id.*, ¶ 16); they were understood by readers and listeners to "mean that plaintiff had engaged in inappropriate, criminal and disreputable behavior" (*id.*, ¶ 17);

and, that defendants acted recklessly as they knew, or should have known, that their statements were false (*id.*, ¶ 18).

The Initial Complaint further alleges, in relevant part, that: defendants acted maliciously with intent to "injure plaintiff in his good name and reputation to expose him to ridicule and contempt, and to punish him and intimidate him because of disputes concerning labor relations" (*id.*, ¶ 19); plaintiff has been thereby subjected to "ridicule and disgrace" (*id.*, ¶ 21); "plaintiff has been greatly injured in his character, reputation, livelihood, and has suffered great physical pain, mental anguish, and embarrassment" (*id.*, ¶ 22); and "[b]y reason of these publications, plaintiff has been greatly injured in his reputation, character and his ability to pursue his livelihood" (*id.*, ¶ 26).

Plaintiff's slander per se cause of action relies on the above pleaded allegations together with the allegation that: "[t]he statements of defendants have accused plaintiff of engaging in criminal activity which constitutes slander per se" (*id.*, ¶ 25).

Defendants move to dismiss plaintiff's Initial Complaint asserting that: (1) plaintiff has failed to plead defamation with sufficient particularity (CPLR 3016 [a]); (2) plaintiff has failed to adequately plead either defamation per se or special damages; and (3) therefore, plaintiff's Initial

Complaint fails to state a cause of action (CPLR 3211 [a] [7]).

Plaintiff counters that the Initial Complaint is sufficient to withstand defendants' motion to dismiss. Nevertheless, he seeks leave to amend it (CPLR 3025 [b]) by "fine tuning" it to include the following additional information: (1) plaintiff's June 6, 2009 termination from the Jing Fong and his resulting loss in income; (2) plaintiff's inability to obtain substitute employment at other Chinese restaurants; (3) the names of the newspapers represented at the news conferences and the names of newspapers that published defendants' statements; and (4) the exact address where the news conferences were held. Proposed Amended Complaint, annexed as Exh. A to Cross Motion (Proposed Complaint).

The Proposed Complaint contains, inter alia, the following proposed pleadings: "[a]s a result of the publication complained of, plaintiff was terminated from his employment at Jing Fong Restaurant on or about July 6, 2009" (Proposed Complaint, ¶ 23); "[a]s a result of the publication complained of, plaintiff has been unable to obtain employment at other Chinese restaurants" (*id.*, ¶ 24); and "[b]y reason of the foregoing slander and defamation, plaintiff has been damaged by loss of his livelihood and as a result has presently suffered damages in the sum of Ten Thousand Five Hundred Dollars (\$10,500.00) together with appropriate interest, the damages of

which is continuing on a monthly basis" (*id.*, ¶ 25). Plaintiff's Affirmation in Support of Cross Motion reiterates the proposed amendments. Defendants oppose plaintiff's cross motion to amend, arguing that the proposed amendment lacks merit.

Leave to amend and supplement pleadings should be freely given by leave of the court upon such terms as may be just. CPLR 3025 (b); *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 (1983). Such leave shall be freely granted absent a showing of prejudice (*Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]), or unfair surprise resulting directly from delay. *Mallory Factor Inc. v Schwartz*, 146 AD2d 465, 467 (1st Dept 1989); see also *Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288, 293 (1998); *Edenwald Contr. Co.*, 60 NY2d at 959.

However, a court is not required to permit futile amendments which may lead to needless litigation. *East Asiatic Co. v Corash*, 34 AD2d 432, 434 (1st Dept 1970). "When a substantial question is raised as to the sufficiency or meritoriousness of a proposed pleading or matter contained therein, "such question should be resolved at the threshold in order to obviate the possibility of needless time consuming litigation." *Sharapata v Town of Islip*, 82 AD2d 350, 362 (2d Dept 1981), *affd* 56 NY2d 332 (1982). An application for leave to amend a pleading is properly denied when it lacks merit. *Thomas Crimmins Contr. Co. v City of New York*, 74 NY2d 166, 170 (1989).

To demonstrate the merit of a proposed amendment the proponent must allege legally sufficient facts to establish a prima facie cause of action or defense in the proposed amended pleading. *Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 371 (1st Dept 1989). "If the facts alleged are incongruent with the legal theory relied on by the proponent the proposed amendment must fail as matter of law." *Id.* When the movant meets this initial burden, "[t]he merit of a proposed amended pleading must be sustained . . . unless the alleged insufficiency or lack of merit is clear and free from doubt." *Id.* The party opposing the motion to amend "must overcome a presumption of validity in favor of the moving party, and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient." *Id.*

To establish a cause of action for slander, plaintiff must establish the following elements: (1) a false statement on the part of the defendant concerning the plaintiff; (2) that was published without privilege or authorization to a third party; (3) with the requisite level of fault on the part of the defendant; and (4) thereby causing damage to plaintiff's reputation by either special harm or defamation per se. *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999).

CPLR 3016 (a) mandates that in actions for libel and slander, "the particular words complained of shall be set forth

in the complaint, but their application to the plaintiff may be stated generally." As held by the Appellate Division, First Department in the oft-cited case of *Gardner v Alexander Rent-A-Car* (28 AD2d 667, 667 [1st Dept 1967]), "[t]his requirement is strictly enforced and the exact words must be set forth. Any qualification in the pleading thereof by use of the words 'to the effect', 'substantially', or words of similar import generally renders the complaint defective." see *Murganti v Weber*, 248 AD2d 208 (1st Dept 1998); *Keeler v Galaxy Communications, LP*, 39 AD3d 1202, 1203 (4th Dept 2007) ("The quoted language in the complaint . . . are mere phrases and thus by implication cannot be the 'exact words' in their entirety allegedly uttered by defendant. . . . 'Rather, those phrases are only a portion of the particular defamatory words and thus are not in compliance with CPLR 3016 (a).") The complaint must also allege the "time, place and manner of the false statement and to specify to whom it was made" [citations omitted]. *Dillon v City of New York*, 261 AD2d at 38.

"A plaintiff suing in libel need not plead or prove special damages if the defamatory statement 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society.'" *Donati v Queens Ledger Newspaper Group*, 240 AD2d 696,

697 (2d Dept 1997), quoting *Rinaldi v. Holt, Rinehart & Winston*, 42 NY2d 369, 379 (1977). Words that injure a person in the pursuit of his/her trade, occupation or profession, or impute the commission of a crime, a loathsome disease, or unchaste behavior in a woman have all been held to be slander per se. *Matherson v Marchello*, 100 AD2d 233, 236 (2d Dep 1984).

The issue to be determined on a motion pursuant to CPLR 3211 (a) (7) is whether the proponent of a pleading has a cause of action, and the motion court must accept the facts alleged in the complaint as true and draw every possible favorable inference in plaintiff's favor. *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). The court presumes the allegations of the complaint to be true and accords them every favorable inference except as they consist of bare legal conclusions or are inherently incredible or flatly contradicted by documentary evidence. *Morgenthow & Latham v Bank of N.Y. Co.*, 305 AD2d 74, 78 (1st Dept), *lv denied* 100 NY2d 512 (2003).

As it relates to Choi and Lam, both the Initial Complaint and the Proposed Complaint (together, the Complaints) fail to: (1) identify any specific statements that were actually made by either Choi or Lam; (2) identify *specific* defamatory words that were spoken by either Choi or Lam; or (3) allege at which of the two news conferences, if any, did Lam and Choi make any such statements.

Plaintiff's Complaints name three separate and distinct defendants--Choi, Lam and Chen. To maintain a cause of action against each defendant, plaintiff must assert the false statement that each defendant made concerning the plaintiff (*Dillon v City of New York*, 261 AD2d at 38), set forth "the particular words complained of" that were uttered by each defendant (CPLR 3016 [a]) and establish that the words spoken constitute slander per se or resulted in special damages, i.e. pecuniary loss. *Liberman v Gelstein*, 80 NY2d 429, 434-435 (1992). Plaintiff cannot rely on generalized allegations against "defendants" as a group to support his claims against an individual defendant. The Proposed Complaint fails to set forth any defamatory statements made specifically by either defendant. Therefore, the Proposed Complaint fails to salvage plaintiff's action as to Lam and Choi.

The sole reference to any statement attributed specifically to an individual are contained in paragraph 12 of the Complaints, and relate to Chen. The paragraph states: "Chen stated that plaintiff called in four big strong men who looked like underworld members. These men went to the restaurant to threaten him and other workers. Defendant Chen continued by stating that plaintiff said 'Tonight you'll be careful after work returning home you will be melted.'" There are no other allegations in the Complaints that link Chen to any of the purported statements made by "defendants."

A complaint alleging slander is legally sufficient if it pleads the utterance of words held to be slander per se; all other actions to recover for slander may only be maintained upon proof of special damages. *Liberman v Gelstein*, 80 NY2d at 434-435; *Danko v Woolworth Co.*, 29 AD2d 855 (1st Dept 1968).

Therefore, in order to maintain this action against Chen, plaintiff must demonstrate that: (1) the statements contained in Paragraph 12 of the Complaints constitute slander and have been pleaded with sufficient particularity; and (2) that those allegations constitute slander per se or, alternatively, that plaintiff has properly set forth a claim for special damages.

As it relates to the issue of slander per se, plaintiff asserts that Chen's statements imply that plaintiff engaged in criminal activity associated with underworld figures and that the facts, as alleged "amount to extortion."

Chen, and the other defendants as well, counter that the statements attributed to them in general, and to Chen in particular, do not amount to slander per se, as there is no factually supported accusation that plaintiff committed a serious crime.

In *Liberman v Gelstein* (80 NY2d at 435]), the Court of Appeals noted that:

Not every imputation of unlawful behavior, however, is slanderous per se. "With the extension of criminal punishment to many minor offenses, it was obviously necessary to

make some distinction as to the character of the crime, since a charge of a traffic violation, for example, would not exclude a person from society, and today would do little, if any, harm to his [or her] reputation at all" (Prosser § 112, at 789).

Thus, the law distinguishes between serious and relatively minor offenses, and only statements regarding the former are actionable without proof of damage (see, Restatement § 571, comment g [list of crimes actionable as per se slander includes murder, burglary, larceny, arson, rape, kidnaping]).

In that action, the plaintiff therein alleged that the defendant had publicly stated that he "threw a punch at [him] . . . screamed at [his] wife and daughter . . . called [his] daughter a slut and threatened to kill [him] and [his] family." *Id.* at 433. The Court of Appeals held that, even if those statements were not rejected by the listeners as hyperbole, absent proof of damages, the statements were not actionable because they did not constitute slander per se, as they only alleged the "relatively minor offence" of harassment. *Id.* at 436. see also *Galasso v Saltzman*, 42 AD3d 310, 311 (1st Dept 2007) (references to connections with organized crime do not constitute slander per se); *Privitera v Town of Phelps*, 79 AD2d 1 (4th Dept 1981) (not slander per se to allege plaintiff member of the "mafia," or "mob" as neither, standing alone, is an indictable offense); *Sharratt v Hickey*, 20 AD3d 734 (3d Dept 2005) (statements accusing plaintiff of violating town ordinances and committing minor environmental law offences do not constitute slander per

se).

Plaintiff has failed to adequately set forth a cause of action for slander per se in either of his Complaints. Plaintiff also asserts that he has suffered special damages, that is, pecuniary loss, and that he has properly pleaded them, to wit: defendants' slanderous statements led to plaintiff's termination from the Jing Fong and his subsequent inability to find a job. A review of these allegations, as pleaded in the Proposed Complaint (¶¶ 23, 24), discloses the absence of supporting factual allegations or details.

In the absence of establishing a causal connection, termination of at-will employment cannot constitute special damages. *Aronson v Wiersma*, 65 NY2d 592, 595 (1985). Other than plaintiff's conclusory affidavit, plaintiff has offered no such causal connection. Given the temporal lapse between the time when the news conferences were held in February 2009, and plaintiff's purported termination from the Jing Fong in July 2009, the omission of supporting details is telling. In both Complaints and in his affidavit, plaintiff has failed to link a specific defendant with a specific statement that directly led to his termination from the Jing Fong. Accordingly, as plaintiff had failed to adequately plead either special damages or defamation per se, plaintiff's complaint as to Chen must also be dismissed.

As plaintiff has failed to "allege legally sufficient facts to establish a prima facie cause of action . . . in the proposed amended [complaint] the proposed amendment must fail as a matter of law" (*Daniels v Empire-Orr, Inc.*, 151 AD2d at 371), and his cross motion for leave to amend his complaint must be denied.

Accordingly, it is hereby

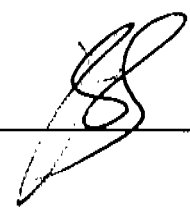
ORDERED that defendants' motion to dismiss plaintiff's complaint is granted and the complaint is dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED plaintiff's cross motion for leave to amend his complaint is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 13, 2010

Enter:



J.S.C.

JANE S. SOLOMON

FILED
MAY 18 2010
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