

**Yoon H. Kim v Shim & Ghim LLC**

2010 NY Slip Op 31630(U)

June 10, 2010

Supreme Court, New York County

Docket Number: 101011/2010

Judge: Lucy Billings

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

LUCY BILLINGS

PRESENT: \_\_\_\_\_ J.S.C. Justice

PART 46

Index Number : 101011/2010  
KIM, YOON H.  
VS.  
SHIM & GHIM, LLC  
SEQUENCE NUMBER : 001  
CONSOLIDATION/JOINT TRIAL

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion ~~is for~~ for DISMISSAL AND COSTS

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... 1  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, ~~it is ordered that this motion~~ the court grants defendants' motion to dismiss the complaint and for costs to the extent set forth in the accompanying decision. C.P.L.R. §§ 3211(a)(7), 8303-a(a) and (c)(i) and (ii); 22 N.Y.C.R.R. §§ 130-1.1(a) and (c)(1) and (2), 130-1.2. Defendants withdrew their motion insofar as it seeks consolidation. The Clerk shall enter a judgment dismissing this action and for \$4,000 in attorney's fees against plaintiff and in favor of defendants.

**FILED**  
JUN 28 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/10/10

Lucy Billings  
LUCY BILLINGS 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 46

-----x

YOON H. KIM,

Index No. 101011/2010

Plaintiff

- against -

DECISION AND ORDER

SHIM & GHIM LLC, JONGSUK KIM, and  
H. SARAH KIM,

Defendants

-----x

LUCY BILLINGS, J.S.C.:

**FILED**  
JUN 28 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

I. BACKGROUND

Plaintiff, president of American Standard Retriever, Inc.,  
sues defendants, a law firm and two of its attorneys, to recover  
damages from defendants' action in New Jersey Superior Court  
against American Standard Retriever, Inc., and other nonparties.  
Defendants sued for those parties' retaliation against  
defendants' representation of an individual in a third action in  
Sullivan County Supreme Court, where defendants' client also sued  
American Standard Retriever, Inc., as well as other parties.

Here, defendants move to: (1) consolidate this action with  
an action in Supreme Court, Queens County, American Standard  
Retriever, Inc. v. Shim & Ghim, LLC, Jongsuk Kim, and H. Sarah  
Kim, Index No. 2182/2010; (2) dismiss the complaint; and (3)  
award attorney's fees to defendants for plaintiff's frivolous  
conduct. At oral argument April 15, 2010, defendants withdrew  
their motion for consolidation. For the reasons explained below,  
the court grants defendants' motion to dismiss the complaint and

for costs in the form of attorney's fees to the extent set forth, without opposition.

## II. DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

The complaint's claims, each claim against all defendants, are for: (1) false accusation, (2) harassment, (3) civil conspiracy, and (4) negligence. The court considers plaintiff's first claim seeking damages for false accusation, which is not a cognizable claim under New York law, a claim for defamation, which plaintiff must plead with specificity. C.P.L.R. § 3016(a). Since plaintiff fails to allege defendants' specific defamatory words, the court must dismiss this claim. C.P.L.R. § 3211(a)(7); LoFaso v. City of New York, 66 A.D.3d 425, 426 (1st Dep't 2009); Mañas v. VMS Assoc., LLC, 53 A.D.3d 451, 454 (1st Dep't 2008); Avant Graphics v. United Reprographics, 252 A.D.2d 462, 463 (1st Dep't 1998).

Plaintiff's second claim for harassment is not a cognizable claim except under specific statutory and regulatory provisions that plaintiff does not rely on and are inapplicable here. Jerulee Co. v. Sanchez, 43 A.D.3d 328, 329 (1st Dep't 2007). Therefore the court dismisses this claim as well. C.P.L.R. § 3211(a)(7). Plaintiff's third claim for civil conspiracy likewise is not cognizable under New York law and must be dismissed. Id.; Waggoner v. Caruso, 68 A.D.3d 1, 6 (1st Dep't 2009), aff'd, \_\_ N.Y.3d \_\_, 2010 WL 1849367 at \*1 (May 11, 2010); Thome v. Alexander & Louisa Calder Found., 70 A.D.3d 88, 110 (1st Dep't 2009).

Finally, plaintiff's fourth claim alleges that defendants "as attorneys . . . have a duty to do a reasonable background search before commencing an action . . . to avoid incriminating or harassing the innocent," Aff. of Young Kon Nah, Ex. 1 ¶ 36, and that their breach of that duty caused plaintiff damages. This claim is either for defamation and thus duplicates the first claim or is for harassment and thus duplicates the second claim, which are both unsustainable as discussed above, or is for legal malpractice. Insofar as this claim is for defamation, like all plaintiff's claims, it complains that defendants associated plaintiff with a defendant business entity in the New Jersey litigation. Even were this claim otherwise sustainable, if defendants' alleged incrimination or harassment was through statements necessary to that litigation, they would be absolutely privileged, immunizing defendants from liability for defamation. Park Knoll Assoc. v. Schmidt, 59 N.Y.2d 205, 209 (1983); Ticketmaster Corp. v. Lidsky, 245 A.D.2d 142 (1st Dep't 1997). Insofar as the fourth claim is for legal malpractice, since the complaint does not allege any attorney-client relationship between the plaintiff and any of defendants, a legal malpractice claim also fails. C.P.L.R. § 3211(a)(7); Waggoner v. Caruso, 68 A.D.3d at 5, aff'd, 2010 WL 1849367 at \*1; Baystone Equities, Inc. v. Handel-Harbour, 27 A.D.3d 231 (1st Dep't 2006).

Regarding the claims as a whole, defendants present documentary evidence that American Standard Retriever, Inc., commenced its own action against defendants in Supreme Court,

Queens County, and that the complaint there is identical to the complaint here, except the plaintiff's name. See C.P.L.R. § 3211(a)(1). Even were the claims here otherwise viable, if the injury alleged is to the corporate entity as the Queens County complaint indicates, plaintiff in his individual capacity may not recover for that corporate injury. Walker v. Saftler, Saftler & Kirschner, 239 A.D.2d 252 (1st Dep't 1997); Quatrochi v. Citibank, 210 A.D.2d 53, 54 (1st Dep't 1994). The Queens County complaint, bearing plaintiff's signature alone, not only suffers from the same deficiencies as the complaint in this action, but also violates the requirement that a corporation appear through an attorney. C.P.L.R. § 321(a); Matter of Sharon B., 72 N.Y.2d 394, 398 (1988); Kinlay v. Henley, 57 A.D.3d 219, 220 (1st Dep't 2008); People v. Park Ave. Plastic Surgery, P.C., 48 A.D.3d 367 (1st Dep't 2008).

### III. DEFENDANTS' MOTION FOR COSTS

Defendants also seek costs in the form of defendants' reasonable attorney's fees assessed against plaintiff for commencing this action, which defendants claim he undertook primarily to harass defendants. Both C.P.L.R. § 8303-a and 22 N.Y.C.R.R. § 130-1.1(a) and (c)(2) authorize such an award to defendants in frivolous personal injury actions. Engel v. CBS, Inc., 93 N.Y.2d 195, 203 (1999); Nyitray v. New York Athletic Club in City of N.Y., 274 A.D.2d 326, 327 (1st Dep't 2000). See Pickens v. Castro, 55 A.D.3d 443, 444 (1st Dep't 2008); Yao v. Bult, 245 A.D.2d 136 (1st Dep't 1997); Strax v. Granoff & Walker,

227 A.D.2d 252 (1st Dep't 1996). In determining whether conduct is frivolous, particularly when due to a harassing purpose, C.P.L.R. § 8303-a(c)(i); 22 N.Y.C.R.R. § 130-1.1(c)(2), the court is not limited to considering the action in which defendants seek fees, but may consider the parties' entire dispute. G&T Term. Packaging Co. Inc. v. Western Growers Assn., 66 A.D.3d 563 (1st Dep't 2009); 187 Concourse Assoc. v. Reliance Natl. Indem. Co., 294 A.D.2d 203, 204 (1st Dep't 2002); Nyitray v. New York Athletic Club in City of N.Y., 274 A.D.2d at 327. Abuse of the judicial process warrants the imposition of sanctions. Bell v. State, 96 N.Y.2d 811, 812 (2001); Murray v. National Broadcasting Co., 217 A.D.2d 651, 653 (2d Dep't 1995).

Plaintiff's conduct, necessitating defendants' defense of two similar meritless actions in different counties, which plaintiff has made no attempt to justify or otherwise explain, raises a compelling inference that the actions were a means of harassment, as well as completely without merit and unsupported by any argument. C.P.L.R. § 8303-a(c)(i) and (ii); 22 N.Y.C.R.R. § 130-1.1(c)(1) and (2); Baystone Equities, Inc. v. Handel-Harbour, 27 A.D.3d 231; Nyitray v. New York Athletic Club in City of N.Y., 274 A.D.2d at 327. On this basis, the court finds his conduct frivolous and awards costs in the form of reasonable attorney's fees to defendants. C.P.L.R. § 8303-a(a) and (c)(i) and (ii); 22 N.Y.C.R.R. §§ 130-1.1(a) and (c)(1) and (2), 130-1.2; Timoney v. Newmark & Co. Real Estate, 299 A.D.2d 201, 202 (1st Dep't 2002); Skolnick v. Goldberg, 297 A.D.2d 18, 21 (1st

Dep't 2002); Nyitray v. New York Athletic Club in City of N.Y., 274 A.D.2d at 327; Murray v. National Broadcasting Co., 217 A.D.2d at 653.

Defendants' attorney affirms that he spent 33 hours preparing this motion and charges \$250 per hour. Although this evidence is unrebutted, and the hourly rate is modest, the hours spent on this unopposed motion, which presents no complex or novel issues, are excessive. Jamie v. Jamie, 19 A.D.3d 330, 331 (1st Dep't 2005). See, e.g., Flanagan v. Flanagan, 267 A.D.2d 80, 81 (1st Dep't 1999); Banco do Estado de Sao Paulo v. Mendes Jr. Intl. Co., 249 A.D.2d 137, 139 (1st Dep't 1998). While plaintiff's lack of representation does not bar the imposition of costs or sanctions against him, e.g., Bell v. State, 96 N.Y.2d 811; Yao v. Bult, 245 A.D.2d 136, the court considers his lack of representation in assessing the amount of the sanctions. Taking the above factors into account, the court assesses attorneys' fees against plaintiff Yoon H. Kim in the amount of \$4,000. C.P.L.R. § 8303-a(a); 22 N.Y.C.R.R. §§ 130-1.1(a), 130-1.2. See Pickens v. Castro, 55 A.D.3d at 444; 187 Concourse Assoc. v. Reliance Natl. Indem. Co., 294 A.D.2d at 204; Skolnick v. Goldberg, 297 A.D.2d at 21.

#### IV. CONCLUSION

In sum, the court grants defendants' motion to dismiss this action in its entirety and defendants' motion for costs to the extent of assessing \$4,000 in defendants' attorney's fees against plaintiff, without opposition. C.P.L.R. §§ 3211(a)(7), 8303-a(a)

and (c) (i) and (ii); 22 N.Y.C.R.R. §§ 130-1.1(a) and (c) (1) and (2), 130-1.2. This decision constitutes the court's order. The Clerk is to enter a judgment dismissing this action and for \$4,000 in attorney's fees against plaintiff and in favor of defendants. The court will mail copies of this decision to defendants' attorney and to plaintiff.

DATED: June 10, 2010

*Lucy Billings*

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LUCY BILLINGS, J.S.C.

LUCY BILLINGS  
J.S.C.

**FILED**  
JUN 28 2010  
NEW YORK  
COUNTY CLERK'S OFFICE