

**Sukoff v Ortho-Pro Biomechanics Group, Inc.**

2010 NY Slip Op 33050(U)

October 20, 2010

Sup Ct, Nassau County

Docket Number: 6907/10

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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MORRIE SUKOFF, DPM,

TRIAL/IAS PART 32  
NASSAU COUNTY

Plaintiff,

Index No.: 6907/10  
Motion Seq. No.: 01  
Motion Date: 06/18/10

- against -

ORTHO-PRO BIOMECHANICS GROUP, INC. and  
JOHN BERGEN in his personal and professional capacity,

Defendants.

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**The following papers have been read on this motion:**

	Papers Numbered
<u>Notice of Motion, Affidavit and Exhibits</u>	<b>1</b>
<u>Affirmation in Opposition, Affidavit and Exhibit</u>	<b>2</b>
<u>Reply Affirmation and Exhibits</u>	<b>3</b>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendants move, pursuant to CPLR § 3016(a), for an order dismissing plaintiff's complaint for failure to comply with special pleading requirements or, in the alternative, transferring the case to the First District Court of the County of Nassau pursuant to CPLR § 325(d). Plaintiff opposes the motion.

The Court first notes that the affidavits of service with respect to both defendants' Notice of Motion and Reply Affirmation are defective in that the Notary Commission of defendants' counsel had expired. However, since defects in the content of affidavit of service are generally treated as minor or amendable, such errors will not invalidate a service which was properly effected. Since this issue was not raised by plaintiff, the Court finds that service was

properly effected and therefore will entertain in the instant motion.

The Court also notes that while defendants' Notice of Motion indicates that defendants are requesting "an Order dismissing plaintiff's Complaint for failure to comply with special pleading requirements pursuant to CPLR § 3016(a)" the "Affidavit in Support of Motion to Dismiss" (which is actually an Affirmation by Counsel not an Affidavit) states that "[t]his Affirmation is respectfully submitted in support of the within Motion to Dismiss pursuant to CPLR § 3211 (a)(7) for failure to state a cause of action with respect to the first and second causes of action, or, in the alternative, to transfer the case to the First District Court of the County of Nassau pursuant to CPLR 325 (d)." The request for an Order dismissing plaintiff's Complaint for failure to comply with special pleading requirements pursuant to CPLR § 3016(a) deals only with the second cause of action in which plaintiff alleges a defamation cause of action. CPLR § 3016(a) states "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally."

Furthermore, defendants' Reply Affirmation states that "[i]t is submitted that after a review of the plaintiff's opposition, it is clear that no triable issues of fact exist such that this honorable court should grant summary judgment." Once again, defendants fail to state the proper relief which they are requesting. Defendants filed a Motion to Dismiss pursuant to CPLR § 3211 (a)((7) for failure to state a cause of action, not a Motion for Summary Judgment pursuant to CPLR § 3212. Although under CPLR § 3211( c), the Court is empowered to treat any 3211 motion as a summary judgment motion, this is not the case in the present matter before this Court. Defendant did not request the Court to treat its motion to dismiss as a motion for summary judgment and the Court is not going to do so *sua sponte*.

The Court also needs to address at the outset plaintiff's request that his attached Amended Complaint (Plaintiff's Affirmation in Opposition Exhibit A) be deemed served upon defendants with service of plaintiff's opposition to defendants' motion. CPLR § 3025(a)- Amended and supplemental pleadings - Amendments without leave- states, "[a] party may amend his pleadings once without leave of the court within twenty days after its service, or at any time before the period of responding to it expires, or within twenty days after service of a

pleading responding to it.” CPLR § 3211(a)(f) - Motions to Dismiss -Extension of time to plead - states, “[s]ervice of a notice of motion under subdivision (a) or (b) before service of a pleading responsive to the cause of action or defense sought to be dismissed extends the time to serve the pleading until ten days after service of notice of entry of the order.” As long as the CPLR 3211 motion is itself timely, the mere making of the motion automatically extends the answering time should the motion be denied. In that instance, a plaintiff winning on the motion must serve on defendant a copy of the order denying the motion with notice of entry. Defendant then has ten days after that in which to answer. “So the mere making of the motion not only extends the answering time but extends it substantially. Depending on when the motion comes on for a hearing and how long the judge takes to decide it, the extension can run into months.” *See* DAVID D. SIEGAL, *NEW YORK PRACTICE* § 277 (4<sup>th</sup> ed. 2005). Consequently, as defendants have not filed an Answer as of date, but instead filed the instant Notice of Motion to Dismiss, plaintiff is still entitled to amend his pleadings without leave of court and he has done so in a timely manner. Therefore, plaintiff’s request that his attached Amended Complaint (Plaintiff’s Affirmation in Opposition Exhibit A) be deemed served upon defendants is granted.

Defendants’ argument that “[a]s plaintiff’s proposed Amended Complaint has never been served, and in any event was included as an exhibit beyond the expiration of the 20-day period set forth under CPLR 3025(a), it is a nullity. Accordingly, the plaintiff’s allegations asserted for the first time in the proposed Amended Complaint are a nullity!” is without legal merit.

The Court will now therefore address defendants’ motion to dismiss to plaintiff’s Amended Complaint. The Court notes that the first two causes of action in plaintiff’s Amended Complaint are identical to the first two causes of action in plaintiff’s original Complaint upon which defendants based said motion to dismiss.

With respect to the first cause of action for breach of contract, defendants argue that, with respect to the claim against defendant John Bergen (“Bergen”), individually, there is no allegation that the corporation is a sham, nor any allegation which would authorize the Court to impose personal liability. As such, defendants assert that this cause of action against defendant Bergen must be dismissed. Defendants further argue as to the claim of breach of contract against both defendant Bergen and defendant Ortho-Pro Biomechanics Group, Inc. (“Ortho”) that the

complaint fails to set forth the terms of the contract and the special damages claimed.

In determining a motion to dismiss pursuant to CPLR 3211(a)(7) for plaintiff's alleged failure to state a cause of action, the court will afford the complaint a liberal construction, accept the facts contained therein as true, accord plaintiff every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); *Fay Estates v. Toys "R" Us, Inc.*, 22 A.D.3d 712, 803 N.Y.S.2d 135 (2d Dept. 2005); *Collins v. Telcoa, International Corp.*, 283 A.D.2d 128, 726 N.Y.S.2d 679 (2d Dept. 2001). In addition, the Court's concern is with whether the pleading states a cause of action and not with determination of facts. *See Stukuls v. State*, 42 N.Y.2d 272, 397 N.Y.S.2d 740 (1977); *Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608, 752 N.Y.S.2d 400 (2d Dept. 2002).

A fair reading of the complaint leads the Court to conclude that plaintiff has stated a cause of action in its first cause of action. Therefore, defendants' motion to dismiss plaintiff's first cause of action is denied.

With respect to the second cause of action for defamation, defendants argue that plaintiff's allegations as contained in paragraphs twenty-second through twenty-fourth "fail to satisfy the pleading requirements of CPLR § 3016(a). Specifically, CPLR § 3016(a) provides that an action for libel or slander, the particular words complained of shall be set forth in the Complaint. In this case, the Complaint fails to even set forth what words were spoken, or to whom they were spoken."

In order to state a claim for defamation, a plaintiff must allege: (1) an oral or written false statement, (2) published without privilege or authorization to a third party, (3) constituting fault as judged by, at a minimum, a negligence standard, which (4) causes special harm or constitutes defamation *per se*. Defendants contend that plaintiff has utterly failed to plead his defamation claim with the requisite particularity and, therefore, his complaint must be dismissed. Defendants submit that plaintiff failed to identify the persons to whom the alleged statements were allegedly made, nor does he even set forth by whom the alleged statements were made. Plaintiff additionally fails to specify the time, place or manner in which said statements were allegedly made.

The Court finds that plaintiff, even after the opportunity to amend his complaint after reading defendants' arguments with respect to his defamation claim, failed to meet the pleading

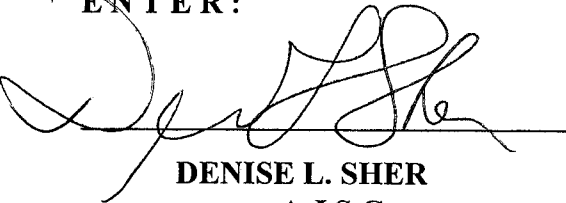
requirements of a defamation claim. The Court further finds that plaintiff's defamation claim must be dismissed because he has failed to sufficiently plead special damages. As plaintiff does not allege that any of the allegedly defamatory statements constitute defamation *per se*, his complaint can only survive if he sufficiently pleads special damages. In order to state a claim for defamation, special damages must be alleged with sufficient particularity to identify actual losses and be related to the alleged tortuous act. Plaintiff's vague allegation of injury or loss to his reputation is not sufficient to satisfy the requirement of pleading special damages, nor does plaintiff even plead any monetary damages. Therefore, defendants' motion to dismiss plaintiff's second cause of action for defamation is hereby granted.

With respect to the third and fourth causes of action contained in plaintiff's Amended Complaint, defendants failed to address same in their reply affirmation based upon the fact that they believed the Amended Complaint was a "nullity!" As defendants were incorrect in this characterization, as detailed in the Court's ruling above, the Court will permit defendants, if they so chose, to file a motion to dismiss with respect to the third and fourth causes of action as they have not had a determination on the merits of these issues.

Defendants' motion, pursuant to CPLR § 325(d), to transfer the case to First District Court is also hereby denied.

It is further ordered that the parties shall appear for a Preliminary Conference on November 22, 2010, at 9:30 a.m. in the Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the decision and order of this Court.

ENTER:  
  
 DENISE L. SHER  
 A.J.S.C.

Dated: Mineola, New York  
 October 20, 2010

**ENTERED**  
 OCT 26 2010  
 NASSAU COUNTY  
 COUNTY CLERK'S OFFICE