

Cheek v DeGuzman

2011 NY Slip Op 32840(U)

October 18, 2011

Supreme Court, New York County

Docket Number: 107758/11

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 58

CARL P. CHEEK & ELENA WONG,

INDEX No. 107758/11

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 001

ELISA ELLEN DeGUZMAN, et al.,

Defendant.

MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: _____ YES NO

FILED

OCT 24 2011

Upon the foregoing papers, it is ordered that this motion is:

NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 10/18/11

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

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

CARL P. CHEEK AND ELENA WONG,

Plaintiffs,

- against -

ELISA ELLEN DeGUZMAN a/k/a ELLEN
DeGUZMAN, "RAMONA MYLA", et al.,

Defendants.

INDEX NO.
107758/11

FILED

OCT 24 2011

NEW YORK
COUNTY CLERK'S OFFICE
DECISION/ORDER

**Justice Donna M. Mills
I.A.P. 58**

This is an action for damages in tort arising from Defendant DeGuzman's alleged involvement in the making of defamatory statements. Plaintiffs allege libel per se and libel as causes of action. Defendant submits this motion to dismiss pursuant to CPLR 3211(a)(4) on the grounds of the existence of a prior pending action, and (2) pursuant to CPLR 3211 (a)(7) for failure to state a cause of action.

FACTUAL ALLEGATIONS

At the time of the alleged defamatory publication, plaintiff Carl P. Cheek was employed by Metropolitan Bank and Trust Company ("Metropolitan"). Plaintiff Elena Wong, who is Carl's wife, was also employed by Metropolitan. Mr. Cheek resigned from Metropolitan on or about July 14, 2010. On that same date, plaintiffs and an Ivan Atmaja received an electronic mail ("email") from a "Ramona Myla" via the email address pricklyrose1957@yahoo.com which read:

"We are very happy you got fired. FYI Elena was Mr. Alfres mistress. You are incompetent. Someone thinks u are a snake and foney. We all noticed how u used to look at Bronwen especially when her back was

turned. Shameful. She is like your daughter. Bronwen also knows. People at your previous bank also know. Metrobank paid you so much money for doing nothing. You did personal work. Looked at guns and bikes. We will send this email to everyone and head office We don't wish you well because you are a bad person. No one likes you."

Plaintiffs' claim that the reference to "Bronwen" in this email is to another female employee who worked at Metropolitan at the time that the email was published. As such, plaintiffs' contend that the email wrongfully alleges that Mr. Cheek engaged in sexual harassment towards Bronwen. Plaintiffs' also allege that the email wrongfully alleges that Mr. Cheek was incompetent in his duties and wrongfully alleges that he intentionally failed to perform his duties in favor of looking at guns and bikes and doing personal work during company time. The plaintiffs' further allege that the email wrongfully alleges that Ms. Wong had been involved in an extramarital affair.

Plaintiffs originally commenced an action to identify the person or persons responsible for publishing the alleged defamatory statement. Subpoenas duces tecum were served upon Yahoo! Inc. and upon an entity named "Opera Software" to determine the name, address, Internet Protocol address information and other identification information concerning the person or persons responsible for the publication of the email that was sent. As a result of this investigation, the computer from which the email originated was identified as one belonging to Metropolitan itself.

Pursuant to a subpoena duces tecum, Metropolitan conducted an investigation of its own computers to determine the identity of the person or persons responsible for the publication of the alleged defamatory statement. Metropolitan's investigation ultimately resulted in the identification of defendant DeGuzman as the person responsible for the publication of the alleged defamatory email.

Prior to filing this case, a previous action on essentially the same cause of action, under index No. 109951/10 was filed between the same parties. Defendant moved to dismiss that action on the grounds that the summons with notice was not served upon the Defendant within the 120 day time pursuant to CPLR § 306-b. On October 12, 2011, this Court granted the Defendant's motion dismissing the initial action.

Plaintiffs who were aware of the lack of service in the first action, commenced the instant action on July 5, 2011 to avoid the one year statute of limitations. As such, that branch of Defendants' motion to dismiss based upon CPLR § 3211(a)(4) is denied, as the prior action has been disposed of.

DISCUSSION

The complaint alleges causes of action for defamation and libel per se. Defamation occurs when one's reputation is injured by another's written (libel) or oral (slander) expression (Morrison v National Broadcasting Co., 19 NY2d 453 [1967]). In this instance, because a written email is at issue, libel is applicable. There are four elements of libel: (1) a false and defamatory statement of fact; (2) regarding the plaintiff; (3) which is published to a third party; and which (4) results in injury to plaintiff; Penn Warranty Corp. v DiGiovanni, 10 Misc 3d 1002 [Sup Ct N.Y. County 2005], citing Idema v Wager, 120 FSupp 2d 361, [S.D. N.Y. 2000]).

Courts have found that a plaintiff sufficiently stated a claim of libel per se where the defendant attributed to him specific acts suggesting the plaintiff's unfitness for his professional role. For instance, in Levy v. Educational Records Bureau, 170 A.D.2d 391, 566 N.Y.S.2d 613, defendant told the parents of plaintiff's student that

plaintiff was an evil influence who coached her pupils to cheat on tests. These statements were per se actionable because they imputed a lack of personal integrity to plaintiff as a tutor (*supra*, at 392, 566 N.Y.S.2d 613). Similarly, in the case at bar, defendant's assertion that plaintiffs were engaged in sexual harassment or unchaste conduct reflects adversely on plaintiffs' integrity in their profession.

Defendant contends that plaintiff's complaint has no claim that Ramona Myla and defendant DeGuzman are one and the same individual. Defendant references plaintiff's affirmation in opposition which claims that the computer on which the alleged libelous statement was made belonged to Metro Bank, DeGuzman's employer, but makes no claim that Defendant DeGuzman had exclusive use, access or control over the computer in question.

The Court of Appeals has held that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 (1994)).

Plaintiffs have, however, adequately stated a claim, pursuant to the pleading requirements of CPLR 3016(b), with respect to their libel and libel per se causes of action against the defendant. The complaint clearly states that (a) the statements in the email constituted false and defamatory statements of facts; (b) regarding the plaintiffs; (c) which were published to a third party and; (d) resulted in injury to them. Moreover, the complaint clearly states that "upon information and belief based upon investigation, the Defamatory Statement originated from an email account owned by and controlled

by defendant DeGuzman.”

Because the facts stated in the Complaint regarding the Defamatory Statement clearly establish that causes of action based upon defamation exists, and that the Defendant was identified as the person responsible for publishing the Defamatory Statement, the Complaint does state valid causes of action based upon defamation and properly states that the Defendant is the proper defendant based upon investigation.

Accordingly, it is

ORDERED that plaintiff’s motion to dismiss the complaint is denied; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 574, 111 Centre Street, on 12/9, 2011, at 10:00 AM.

Dated: 10/18/11

FILED

OCT 24 2011

ENTER:

NEW YORK
COUNTY CLERK’S OFFICE

Donna M. Mills
J.S.C.

DONNA M. MILLS, J.S.C.