

**Rich v Lorge**

2011 NY Slip Op 33715(U)

July 8, 2011

Supreme Court, New York County

Docket Number: 150039/2010

Judge: Joan A. Madden

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

PRESENT: Hon Jacob A. Madden

PART 11

Index Number : 150039/2010  
 RICH, ALAN J  
 vs  
 LORGE, ABIGAIL  
 Sequence Number : 001  
 DISMISS

INDEX NO. \_\_\_\_\_  
 MOTION DATE 1-20-11  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Memorandum Decision & Order.

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MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

Dated: July 8, 2011

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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 11

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ALAN J. RICH,

Plaintiff,

-against-

Index No. 150039/2010

ABIGAIL LORGE, JAMES MARTIN, MILLER  
PUBLISHING GROUP, L.L.C. d/b/a TENNIS  
MAGAZINE and TENNIS.COM, and MILLER  
SPORTS GROUP, L.L.C. d/b/a TENNIS MAGAZINE  
and TENNIS.COM,

Defendants.

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NYC SUPREME COURT - CIVIL

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Joan A. Madden, J.:

Defendants Abigail Lorge (“Lorge”), James Martin (“Martin”), Miller Publishing Group, L.L.C. d/b/a Tennis Magazine and TENNIS.com (“Miller Publishing”) and Miller Sports Group, L.L.C. d/b/a Tennis Magazine and TENNIS.com (“Miller Sports”) (collectively, “Defendants”) move pursuant to CPLR 3012(b) to dismiss this action for failure to timely serve a complaint. Plaintiff, Alan J. Rich, an attorney pro se, cross moves pursuant to CPLR 3012(d) for an order to permit late service of complaint.

BACKGROUND

On September 27, 2008, Alan J. Rich (“Rich”), an attorney, writer, film maker and commentator, contacted Ed McGrogan (“McGrogan”), an online Editor for TENNIS.com concerning the possibility of submitting an article to be published in Tennis Magazine. McGrogan informed Rich that he was looking for an article for their on-line edition, TENNIS.com (Compl. ¶¶ 7-8). Thereafter, Rich began to write an article for Tennis.com, which he hoped would serve as his “calling card” as a writer and film maker (Id. ¶¶ 6,9).

On or about November 17, 2008, Rich submitted his article to McGrogan and soon after met with McGrogan and his superior, Abigail Lorge (“Lorge”), whereupon, Rich requested that

he be given “some editorial input on his story” (Id. ¶ 9). However, without informing Rich beforehand, Lorge edited Rich’s article and posted the edited version on TENNIS.com (Id. ¶ 10). Lorge informed Rich that his article had been posted on February 13, 2009 (Id. ¶ 10).

The complaint alleges that the edited version failed to include a photograph and contains “factual changes and errors and was inferior in style, including the use of intentionally poor writing such as the of the expression, ‘and so on’” (Id. ¶ ¶ 11-12). It further alleges, “that there were people who would know the inaccuracies in the article” and that Lorge’s actions were “intended to portray Rich as a poor writer” and “humiliate Rich by dissembling every single sentence he wrote, until it was no longer his article and not a representation of his writing” (Id. ¶ ¶ 12-13). Lorge informed Rich “where she posted it on the web site, nobody would read it anyway.” Furthermore, in a February 23, 2009 phone call, Rich alleges that Lorge attacked Rich personally by stating that “his writing was filled with cliches, as well as style and grammar error . . . . [and] Rich harassed her to publish the piece” (Id. ¶ 12). Subsequently, Lorge removed the article from TENNIS.com.

In an effort to resolve the issue, Rich contacted Lorge’s superior, James Martin (“Martin”). Martin informed Rich that he agreed with Lorge’s judgments, including removing the article from TENNIS.com. In response to Rich’s request that a correction or retraction be posted, Martin responded that “the only correction I feel compelled to write is one in which I tell our readers I’m sorry for publishing the story at all, in any iteration” (Id. ¶ ¶ 14-15).

On February 13, 2010, Rich filed a summons with notice in lieu of serving a complaint. On June 4, 2010, Defendants Lorge, Miller Publishing & Miller Sports, demanded service of a complaint. Similarly, on June 11, 2010, Defendant Martin demanded service of a complaint. On June 24, 2010, Rich requested a ten-day extension of time to serve a complaint. The following day, Defendants agreed to extend the time to serve the complaint until July 15, 2010. However, when Defendants did not receive Rich’s complaint by that date, they filed this motion to dismiss

for failure to timely serve a complaint pursuant to CPLR § 3012(b).

On August 16, 2010, Rich requested a two-week adjournment of his time to file an opposition to motion to dismiss. Consequently, the parties entered into a stipulation allowing Rich to serve opposition papers no later than August 31, 2010. However, instead, Rich served his complaint on September 1, 2010 and served his opposition papers on September 13, 2010. The complaint contains causes of action for libel, libel per se and prima facie tort.

In support of his cross-motion and in opposition to Defendants' motion to dismiss, Rich submits his affidavit, which essentially restates the allegations stated in the complaint but also attaches as an exhibit statements that provide particularized statement and explanations regarding the allegedly defamatory statements. Rich states that the errors due to the edits include: use of passive voice, poor sentence structure, use of verb at end of sentence, weakening focus of sentence, adding repetitive expression that is the "hallmark of poor writing," including a factual error falsely stating that Rich visited the Office of Spartak Tennis Club, repeating a name that is long in length and difficult to pronounce, inserting parenthesis, altering sentence to a compound run-on sentence, and omitting original sentences (Rich's Reply Affirmation, Exhibit "G").<sup>1</sup>

#### DISCUSSION

To avoid dismissal for failure to timely serve a complaint after a demand for the complaint has been made pursuant to CPLR § 3012(b), a plaintiff must demonstrate both a reasonable excuse for the delay in serving the complaint and a potentially meritorious cause of action. See e.g. Grace v. Follini, 80 A.D.3d 560, 560-61 (2d Dep't 2011). "The determination of what constitutes a reasonable excuse for a default lies within the sound discretion of the Supreme

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<sup>1</sup> The Defendants' request, stated in the November 5, 2010 letter, for the court to disregard Rich's Reply Memorandum is declined. However, we also accept the Defendants' Surreply Memorandum and take the issues raised in both reply papers into consideration for this motion.

Court.” Pristavec v. Galligan, 32 A.D.3d 834, 834–35 (2d Dep’t 2006). “When exercising its discretion in this regard, a court should consider all relevant factors, including the extent of the delay, the prejudice to the opposing party, and the lack of an intent to abandon the action.” Aquilar v. Nassau Health Care Corp., 40 A.D.3d 788, 789 (2d Dep’t 2007). Additionally, the court has the discretion to excuse plaintiff’s delay based on law office failure. See CPLR 2005; See also Kordasiewicz v. BCC Products, Inc., 26 A.D.3d 853 (4th Dep’t 2006).

Rich alleges his forty-eight day delay in serving the complaint is a result of law office failure and his medical condition. Specifically, he asserts that he was unable to complete the complaint because of his paralegal’s absences and overwhelming workload and the delay is not overly prolonged to cause prejudice or indicate his abandonment of the case. However, even accepting arguendo that Rich’s excuses are adequate and reasonable, Rich has failed to present a meritorious cause of action for libel, libel per se, or prima facie tort and therefore the complaint is must be dismissed. Manhattan King David Rest., Inc. v. Nathanson, 269 A.D.2d 297 (1st Dep’t 2000) (“The complaint was properly dismissed for failure to show a reasonable excuse for the two and a half-month delay in serving it and a meritorious cause of action.”)(emphasis supplied).

“Defamation has long been recognized to arise from the making of a false statement which 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.” Dillon v. City of New York, 261 A.D.2d 34, 37-38 (1st Dep’t 1999) (citations and quotations omitted). The pleading of a meritorious claim for libel requires a showing of “[a] false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se. CPLR 3016(a) requires that in a defamation action, ‘the particular words complained of . . . be set forth in the complaint.’ The complaint also must

allege the time, place and manner of the false statement and to specify to whom it was made.” Id. at 38 (citation omitted). In addition, to properly plead libel the plaintiff must allege special damages. To state a claim for libel per se, which does not require special damages, it must be shown that the allegedly libelous statements (i) charge plaintiff with a serious crime, (ii) tend to injure plaintiff in his trade, business or profession, (iii) indicate that plaintiff has a loathsome disease, or (iv) impute unchastity to a woman. Liberman v. Gelstein, 80 N.Y.2d 429, 435 (1992).

Here, Rich first alleges, in his papers in support of his cross-motion and in opposition to Defendants’ motion, that his libel claim was based on his depiction as a “bad writer” resulting from the edits made by Lorge. Rich then alleged, in his reply memorandum, that he has been defamed because of false attribution of his name to an article that due to the extensive edits is no longer his article. These arguments are unavailing.

“Where a plaintiff alleges that statements are false and defamatory, the legal question for the court on a motion to dismiss is whether the contested statements are reasonably susceptible of a defamatory connotation.” Armstrong v. Simon & Schuster, Inc., 85 N.Y.2d 373, 380 (1995) (citations omitted). The edited version of Rich’s article is not reasonably susceptible to a defamatory connotation as no ordinary reader upon reading the article on TENNIS.com would regard changes such as using parenthesis, placing a long name in the title, or the use of the phrase “anyone who’s anyone” as libelous.

To properly plead libel, “it is not necessary for the defendant in its paper to directly attack the plaintiff,” but a statement “which shows him to the profession to be an ignoramus and a bungler . . . [and] is an attack upon [his] profession and livelihood ” is libelous. Ben-Oliel v. Press Pub. Co., 251 N.Y. 250, 255 (1929). But, as is the case here, simply stating, “that the published work was different from the original is not to state that the plaintiff was libeled [because] . . . [t]here is always a possibility that any change in the original work was made for the better rather than the worse. Moreover, a change in the content or form of the plaintiff’s

original work does not necessarily indicate that the plaintiff was held in disgrace or ridicule by his literary peers.” Edison v. Viva Intern., Ltd., 70 A.D.2d 379, 385 (1st Dep’t 1979).

The court does not have a burden to “strain to place a particular interpretation on the published words” and only when “the contested statements are reasonably susceptible of a defamatory connotation, then ‘it becomes the jury’s function to say whether that was the sense in which the words were likely to be understood by the ordinary and average reader.’” James v. Gannett Co., Inc., 40 N.Y.2d 415, 419 (1976). Rich alleges that his claim cannot be dismissed since there is a possible defamatory meaning to the depiction of his article and that it is a question for the jury. However, Rich’s article is not reasonably susceptible to a defamatory meaning and “[w]hether particular words are defamatory presents a legal question to be resolved by the court in the first instance.” Aronson v. Wiersma, 65 N.Y.2d 592, 593 (1985) (citations omitted). Accordingly, the claim for libel<sup>2</sup> and libel per se are without merit.

The claim for prima facie tort is also insufficient. The elements of a cause of action sounding in prima facie tort include “(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts which are otherwise legal.” Christopher Lisa Matthew Policano, Inc. v. N. Am. Precis Syndicate, Inc., 129 A.D.2d 488, 489 (1st Dep’t 1987). To recover under prima facie tort, a plaintiff must also plead special damages in the form of a “specific and measurable loss.” Freihofer v. Hearst Corp., 65 N.Y.2d 135, 143 (1985). “[Special] [d]amage[s] is an essential element in a cause of action for prima facie tort and . . . damages pleaded in such round sums, without any attempt at itemization, must be deemed allegations of general damages.” Leather Development Corp. v.

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<sup>2</sup> The libel claim must also be dismissed based on Rich’s failure to plead special damages. See Akpinar v. Moran, 83 A.D.3d 458, 459 (1st Dep’t 2011) (“[Plaintiff’s] allegation that he lost \$17 million in venture funding from unspecified individuals who read the statements fails to adequately plead special damages.”).

Dun & Bradstreet, Inc., 15 A.D.2d 761, 761 (1st Dep't 1962).

Rich has failed to allege, as required, that "disinterested malevolence" was the sole motive for the defendant's posting the edited article. It must be shown that the Defendants acted from disinterested malevolence, meaning that "the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another." Beardsley v. Kilmer, 236 NY 80, 90 (1923). A malicious intention must be the defendant's sole motivation in order to recover under prima facie tort. Squire Records, Inc. v. Vanguard Rec. Soc., Inc., 25 A.D.2d 190 (1st Dep't 1966), appeal dismissed, 17 N.Y.2d 870 (1966). Recovery is barred if other motives exist, such as "profit, self-interest, business advantage." Id. at 191. Here, the complaint clearly indicates that Defendants had a business motive in posting the article, and therefore were not solely motivated by an intent to harm Rich.

Accordingly, as the complaint fails to state a viable cause of action, the motion to dismiss is granted.

#### CONCLUSION

In view of the above, it is

ORDERED that the motion to dismiss is granted; and it is further

ORDERED that the cross motion for leave to permit late service of the complaint is denied; and it is further

ORDERED that the Clerk is directed to dismiss the complaint in its entirety.

Dated: July 8, 2011

  
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J.S.C.