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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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CHICO S.S. MOSS,

Plaintiff,

Index No. 158705/2013

-against-

DECISION/ORDER

THE ASSOCIATED PRESS, FORBES INC., NEWS CORPORATION d/b/a THE NEW YORK POST, CARLA M. FRANKLIN, TIME WARNER INC. d/b/a AOL, INTERACTIVE CROP. d/b/a THE DAILY BEAST and JOHN DOES 1-100,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Replying Affidavits.....	
Exhibits.....	3

Plaintiff Chico S.S. Moss ("Moss") has brought the present motion to vacate this court's order dated April 3, 2013, which dismissed his complaint and granted default judgment against him and in favor of defendant Carla M. Franklin ("Franklin") on her counterclaims based on his failure to appear for two conferences before this court. For the reasons set forth below, plaintiff's motion is granted in part.

The relevant facts are as follows. Moss and Franklin are former romantic partners who have been locked in numerous litigations with one another over the past several years involving

initial allegations by Franklin that Moss harassed and cyberstalked her. The instant action stems from, among other things, news articles that were published after Franklin brought suit against Moss in September of 2012 (the "September Litigation") wherein Franklin sought to enjoin Moss from further harassment and an award of damages. Franklin's complaint in the September Litigation (the "Franklin Complaint") contained numerous allegations describing Moss's behavior through the years as obsessive and describing stalking behavior that included authorship of a YouTube Video and Facebook page, which Franklin described as "Shrines" to her as well as an allegation that Moss had "spoofed" her cell phone to make harassing calls and texts.

After the Franklin Complaint was filed against Moss, several news organizations picked up and published articles about the Franklin Complaint and Franklin's legal efforts to identify her harasser. The instant action, specifically, involves the following articles:

- The Associated Press: "NY Woman Sues Man She Unmasked Through Google;"
- The New York Post: "Harass' Vic Goes After Bum" (also published under the headline "Columbia Grad Sues 'Stalker' Who Called Her 'Whore' on YouTube");
- Forbes: "How To Bait and Catch The Anonymous Person Harassing You On The Internet;"
- The Daily Beast: "Busting a Cyberstalker: How Carla Franklin Fought Back–and Triumphed;"

The New York Post (the "Post") story, by Dereh Gregorian, was published on September 26, 2012. The Post article reported the filing of the Franklin Complaint and quoted directly from the allegations contained therein. The Forbes article, on the other hand, was an article about online harassment generally and reported on two different cases in which individuals sought to discover the identity of someone who had engaged in online harassment against them, which included the

September Litigation. The article contained a lengthy quotation from an email from Franklin in which she explained the methods she used to identify her harasser. The article was published on September 28, 2012. The Daily Beast article, first published on October 12, 2012, is written in first person narrative in the voice of Franklin "as told to" the reporter. In the article, Franklin is seen to be telling the story of her and Moss and her path to filing the Franklin Complaint.

On or about September 23, 2013, Moss commenced the instant action, *pro se*, by filing a summons and verified complaint asserting a claim for defamation based on the articles listed above. Thereafter, on or about October 7, 2013, Moss amended his complaint to add Franklin as a defendant and to assert additional claims for intentional infliction of emotional distress and tortious interference with contract. On or about November 25, 2013, Franklin appeared in the action by interposing an answer with counterclaims. Specifically, Franklin asserted counterclaims for defamation, tortious interference with prospective business relations, intentional and negligent infliction of emotional distress, assault and invasion of privacy. The remaining defendants, in lieu of an answer, filed motions to dismiss, which this court granted by decision/order dated January 16, 2014, on the ground that Moss failed to effectuate proper service upon them.

Thereafter, a preliminary conference was scheduled to be held on March 18, 2014. On that date, Franklin's attorney appeared and was ready to proceed but Moss failed to appear. Thus, the conference was adjourned to April 1, 2013. Moss again failed to appear on said date and this court issued an order dated April 3, 2013 (the "April Order") dismissing Moss's complaint and granting Franklin default judgment on her counterclaims pursuant to the Uniform Rules for New York State Trial Courts § 202.27(a). Moss, who has since retained counsel, now

moves to vacate the April Order.

It is well settled that courts have a strong public policy to dispose of cases on their merits. *Harwood v. Chaliha*, 291 A.D.2d 234 (1st Dept 2002). Accordingly, "[a]n order dismissing a claim pursuant to 22 NYCRR 202.27, based on a party's failure to appear at a calendar call, should be vacated where the party shows a reasonable excuse for the default and a meritorious cause of action [and/or a meritorious defense]." *Id.*; *see also Levy v. New York City Hous. Auth.*, 287 A.D.2d 281 (1st Dept 2001); *Arred Enterprises Corp. v. Indemnity Ins. Co.*, 108 A.D.2d 624 (1st Dept 1985).

In the present case, as an initial matter, the portion of Moss's motion seeking to vacate the default judgment entered against him is granted as he has shown a reasonable excuse for his default and a meritorious defense to Franklin's counterclaims. Moss has demonstrated a reasonable excuse for his failure to appear at the conferences by attesting to the fact that he was a *pro se* litigant residing in Brazil at the time this action was commenced and never received notice of the conferences. While a litigant's *pro se* status does not excuse his duty to stay abreast of all court appearances, courts will give some leniency to *pro se* litigants in the interest of justice. Thus, as Moss has otherwise fully participated in this litigation, the court finds that his failure to appear at the conferences is excusable. Additionally, Moss has demonstrated a meritorious defense to Franklin's counterclaims as he attests, as he has throughout all prior litigation, that Franklin's allegations are false.

However, the portion of Moss's motion seeking to vacate the dismissal of his complaint is denied as he has failed to demonstrate a meritorious cause of action. As an initial matter, plaintiff has failed to demonstrate a meritorious cause of action for defamation as the allegedly defamatory statements in his second amended complaint are either time-barred or absolutely

privileged. Pursuant to CPLR § 215(3), defamation claims are subject to a one year statute of limitations. The cause of action accrues at the time of publication of the alleged defamatory statement. *See Firth v. State*, 96 N.Y.2d 365, 368-69 (2002). Additionally, it is well settled that statements made in the course of judicial proceedings, which would otherwise be defamatory, are absolutely privileged if at all pertinent to the litigation. *See Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 170 (1st Dept 2007); *Lacher v. Engel*, 33 A.D.3d 10, 13 (1st Dept 2006). Whether a statement is at all pertinent to the litigation "is determined by an 'extremely liberal' test." *Id.* at 173. Further, reports on judicial proceedings are also entitled to absolute immunity from suit as long as they are a "fair and true" report of the proceeding. *See* Civil Rights Law § 74; *Holy Spirit Assn. For Unification of World Christianity v. New York Times Co.*, 49 N.Y.2d 63, 67 (1979). "For a report to be characterized as 'fair and true' within the meaning of the statute . . . it is enough that the substance of the article be substantially accurate." *Holy Spirit*, 49 N.Y.2d at 67. Indeed, as the Court of Appeals made clear in *Holy Spirit,* "the language used [in the article] should not be dissected and analyzed with a lexicographer's precision." *Id.* Thus, only "[i]f the published account, along with the rest of the article, suggests more serious conduct than that actually suggested in the official proceeding" will the privilege not attach. *Daniel Goldreyer, Ltd. v. Van de Wetering*, 217 A.D.2d 434, 436 (1st Dept 1995).

Here, Moss's claims for defamation based upon the allegedly defamatory news articles outlined above, with the exception of the Daily Beast article, are time-barred as the articles were published more than a year prior to Moss commencing the instant action against Franklin. The Associated, Post and Forbes articles were all originally published in September 2012. However, Moss did not file his second amended complaint naming Franklin as a defendant until October 7, 2013. Thus, Moss failed to bring suit within a year of the articles being published and any such

claims are now time-barred.

Additionally, the remaining allegedly defamatory statements upon which Moss brings the instant claim for defamation are protected by absolute privilege and are non-actionable. The only defamatory statements alleged by Moss that are not time-barred are the statements made in the Franklin Complaint and the Daily Beast article. As an initial matter, any statements in the Franklin Complaint would clearly be entitled to absolute privilege as they were directly made in the course of judicial proceedings. To the extent Moss argues that the privilege should no longer attach as the Franklin Complaint was ultimately dismissed as to him, such contention is without merit as the final outcome of the proceeding has no bearing on the protection afforded to statements made during it. Additionally, the content of the Daily Beast article is immune from suit as it was a fair and true report of the September Litigation, which was a judicial proceeding. Although the article is styled in a first person narrative form, its contents pertain exclusively to the September Litigation and the writer does not suggest anymore serious conduct on the part of Moss than is alleged in the Franklin Complaint. Indeed, the writer of the article explicitly states, speaking in the voice of Franklin, "the story I tell here is laid out in my lawsuit." Moreover, the subheading of the article, which appears above the article, states: "Now she's suing him–in a new frontier of online crimes." Clearly, this would prompt a reasonable reader to understand that the article was reporting on the September Litigation.

Additionally, Moss has failed to demonstrate a meritorious cause of action for intentional infliction of emotional distress as he fails to allege or identify any conduct by Franklin that occurred within a year prior to initiating this suit and, as such, any claim for intentional infliction of emotional distress is time-barred. Similar to defamation claims, claims for intentional infliction of emotional distress carry a one year statute of limitations. CPLR § 215(3). Here,

Moss bases his claim for intentional inflectional of emotional distress on Franklin's alleged vexatious use of the legal system and the actions in connection thereto. Specifically, Moss alleges in his second amended complaint that "Franklin's false allegations, repeated lying to court, filing of false subpoenas at Moss's place of business, and campaign of lies directed at Moss were clearly and obviously intentional . . ." However, these actions all occurred between 2011 and the commencement of the September Litigation in September of 2012. Moss did not commence the instant action against Franklin until October 7, 2013. Thus, his claim for intentional infliction of emotional distress is time-barred.

Finally, Moss's second amended complaint fails to state a meritorious cause of action for tortious interference with contract. "A claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages." *Foster v. Churchill*, 87 N.Y.2d 744, 749-50 (1996). Here, Moss's complaint is devoid of any allegations that there was a breach in his contract with his former employer. Indeed, he admits that he was told by his employer that "his group was being restructured."

Based on the foregoing, Moss's motion to vacate the April Order is granted only to the extent that the default judgment entered against him and in favor of Franklin and directing an inquest as to damages on Franklin's counterclaims is hereby vacated. Accordingly, it is hereby

ORDERED that the portion of this court's Decision/Order dated April 3, 2013, granting default judgment against Moss as to Franklin's counterclaims is hereby vacated; and it is further

ORDERED that the parties are to appear for a preliminary conference on Tuesday July 22, 2014 at 11:00 a.m. in room 432 at 60 Centre Street, New York, NY. This constitutes the decision and order of the court.

Dated: 6/16

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.