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SHORT FORM ORDER

INDEX No. 13-15544

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 9-10-13
ADJ. DATE 11-26-13
Mot. Seq. # 001 - MG; CASEDISP

DONALD BEYER,

Plaintiff,

- against -

PARENTS FOR MEGAN'S LAW and LAURA AHERN,

Defendants.

SCOTT LOCKWOOD, ESQ.
Attorney for Plaintiff
1476 Deer Park Avenue, Suite 3
No. Babylon, New York 11703

MIRANDA SAMBURSKY SLONE SKLARIN VERVENIOTIS, LLP
Attorney for Defendants
240 Mineola Boulevard, Esposito Building
Mineola, New York 11501

Upon the following papers numbered 1 to 21 read on this motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 18 - 19; Replying Affidavits and supporting papers ____; Other memoranda of law 17, 20 - 21; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Parents For Megan's Law and Laura Ahern for an order pursuant to CPLR 3211 (a) (1), (5) and (7) dismissing the complaint is granted.

This is an action for defamation and intentional infliction of emotional distress. It is undisputed that, in February 2006, the defendant Parents For Megan's Law (PFML) uploaded and published on its website an edited version of an article that appeared in Newsday, a local newspaper, on January 31, 2006. The Newsday article reported that the plaintiff had been arrested for stalking a 13 year-old boy. In his complaint, the plaintiff alleges that, upon being informed about this website, he contacted PFML in February 2013 and requested that it remove the article, as he had been acquitted of the charges, or that the website be changed to indicate his acquittal, and that he was told that the website would not be changed. The plaintiff further alleges that multiple links to PFML's edited article under a webpage labeled "Sex Offenders in Positions of Trust News" is a false statement that he is a sex offender, and that the defendant Laura Ahearn, sued herein as Laura Ahern (Ahearn), was responsible for the content set forth on the website.

The defendants now move for an order dismissing the complaint pursuant to CPLR 3211 (a) (1), (5) and (7). In support of their motion, the defendants submit, among other things, the complaint, an affirmation from their attorney, and affidavits from Ahearn and PFML's information technology and

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website manager, Timothy Haley (Haley). In her affidavit, Ahearn swears that PFML is a not-for-profit corporation dedicated to the prevention and treatment of child sexual abuse, and to providing services to the elderly, the disabled, and the victims of crimes. She states that she is the executive director of PFML, which maintains a website which includes the re-publication of third-party news articles detailing sex-offender related information. She indicates that the edited version of the Newsday article (the web article) was published in February 2006 and re-published on July 17, 2008. Ahearn further swears that PFML submitted a Freedom of Information Law (FOIL) request to the Suffolk County Police Department on January 24, 2013, and learned that the plaintiff had been convicted of the charge of Sex Abuse in the Third Degree on April 10, 1974, receiving a sentence of conditional discharge. She indicates that, based on that information, "the one paragraph re-publication of the Newsday article was truthful in its entirety."

In his affidavit, Haley swears that he has over 30 years of experience in computer operations, programming and maintenance, that he is employed by PFML as its website manager, and that he reviewed and analyzed the website publication data for the Newsday article re-published by PFML. He states that the web article was uploaded on PFML's website in February 2006, and that the text has not been edited or re-published in any other format. He indicates that a system backup of the website was conducted on or about July 14, 2008, and that "a system restore for the PFML website files and content was completed on July 16, 2008. Haley further swears that "screenshots" of the website workplace administration page attached as exhibits to his affidavit indicate that the various links or sub-categories under the category "Sex Offenders in Positions of Trust News" were last modified on July 16, 2008 in connection with the system restore, and that the web article was last modified and re-published on July 17, 2008. He states that the web article "was re-published without modification or editing and in the same format as originally restored on July 17, 2008."

In his affirmation, counsel for the defendants contends, among other things, that the plaintiff's first cause of action for defamation is time-barred, and that the plaintiff has failed to state a cause of action for intentional infliction of emotional distress. A movant seeking to dismiss a petition/complaint insofar as asserted against it as time-barred pursuant to CPLR 3211 (a) (5) has the initial burden of proving through documentary evidence that the action was untimely commenced after its accrual date (*see* ***Tsafatinos v Wilson Elser Moskowitz Edelman & Dicker, LLP***, 75 AD3d 546, 903 NYS2d 907 [2d Dept 2010]; ***Morris v Gianelli***, 71 AD3d 965, 897 NYS2d 210 [2d Dept 2010]; ***Lessoff v 26 Ct. St. Assoc., LLC***, 58 AD3d 610, 872 NYS2d 144 [2d Dept 2009]; ***Sabadie v Burke***, 47 AD3d 913, 849 NYS2d 913 [2d Dept 2008]). Thereafter, the burden shifts to the plaintiff to aver evidentiary facts establishing that the action was timely or to raise an issue of fact as to whether the action was timely (***Symbol Technologies, Inc. v Deloitte & Touche, LLP***, 69 AD3d 191, 888 NYS2d 538 [2d Dept 2009]; ***Lessoff v 26 Ct. St. Assoc., LLC***, *supra*; ***Gravel v Cicola***, 297 AD2d 620, 747 NYS2d 33 [2d Dept 2002]).

Here, the defendants have submitted copies of the web article indicating it was submitted on January 31, 2006, and copies of the screenshots showing the system restore on July 16, 2008 and the re-publication of the web article on July 17, 2008. The statute of limitations for an action to recover damages for defamation is one year measured from the date the allegedly defamatory statement was published (*see* CPLR 215 [3]; ***Sethi v Morrissey***, 105 AD3d 833, 961 NYS2d 809 [2d Dept 2013]).

New York follows the "single publication" rule which provides that the publication of a defamatory statement in a single issue of a magazine or a book, regardless of the number of copies the statement appears in or the range of the publication's distribution, constitutes only one publication and gives rise to only one cause of action (***Hoesten v Best***, 34 AD3d 143, 821 NYS2d 40 [1st Dept 2006]). It has been held that the single publication rule applies to defamation actions arising out of allegedly defamatory statements published on internet websites (*see* ***Firth v State of New York***, 98 NY2d 365, 747 NYS2d 69 [2002]; *see generally* ***Haefner v New York Media, LLC***, 82 AD3d 481, 918 NYS2d 103 [1st Dept 2011]; ***E.B. v Liberation Publications, Inc.***, 7 AD3d 566, 777 NYS2d 133 [2d Dept 2004]). In addition, a cause of action for defamation accrues when the alleged defamatory statement is published, not when it is discovered (***Casa de Meadows Inc. (Cayman Is.) v Zaman***, 76 AD3d 917, 908 NYS2d 628 [1st Dept 2010]; ***Teneriello v Travelers Cos.***, 226 AD2d 1137, 641 NYS2d 482 [4th Dept 1996]; *see also* ***Meyer v Onondaga County***, 30 AD3d 1002, 817 NYS2d 464 [4th Dept 2006]; ***Memory's Garden v D'Amico***, 84 AD2d 892, 445 NYS2d 45 [3d Dept 1981]). Finally, it has been held that continuous access to an article on a website or subsequent clicks or "hits" reviewing the article are not re-publications creating a subsequent accrual of a cause of action for the purposes of the statute of limitations (***Firth v State of New York***, *supra*; ***Haefner v New York Media, LLC***, *supra*.

This action was commenced by the filing of a summons and complaint on July 14, 2013, almost five years after the re-publication of the web article by the defendants on July 17, 2008. Thus, the defendants have met their initial burden of proving that the plaintiff's cause of action for defamation is time-barred. In opposition, the plaintiff contends that discovery is necessary to determine the date his cause of action for defamation accrued, and that the single publication rule is not applicable because he contacted the defendants and advised them of the misleading statement in February 2013.[1] It is determined that the plaintiff's contentions are without merit and that he has failed to raise an issue of fact as to whether the action was timely. Accordingly, the defendants motion to dismiss the plaintiff's first cause of action for defamation is granted.

To the extent that the plaintiff's cause of action for intentional infliction of emotional distress can be read to include allegations of mental anguish based on the publication or re-publication of the web article on the defendants' website it is dismissed because the allegations "fall within the ambit of other traditional tort liability which, in this case, is reflected in plaintiff's causes of action sounding in defamation" (***Herlihy v Metropolitan Museum of Art***, 214 AD2d 250, 263, 633 NYS2d 106 [1st Dept 1995]; *see also* ***Hirschfeld v Daily News***, 269 AD2d 248, 703 NYS2d 123 [1st Dept 2000]; ***Butler v Delaware Otsego Corp.***, 203 AD2d 783, 610 NYS2d 664 [3d Dept 1994]; ***Liker v Weider***, 2003 WL 25712421 [Sup Ct, New York County 2003]). In this instance, the underlying cause of action for defamation has been dismissed as untimely. In any event, that portion of the cause of action for intentional infliction of emotional distress based on such allegations would themselves be barred by the

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[1] The plaintiff does not dispute the fact that he was convicted of the sex abuse of a minor in 1974. Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted (*see* ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***SportsChannel Assoc. v Sterling Mets, L.P.***, 25 AD3d 314, 807 NYS2d 61 [1st Dept 2006]; ***Mascoli v Mascoli***, 129 AD2d 778, 514 NYS2d 521 [2d Dept 1987]; *see also* ***Ferluckaj v Goldman Sachs & Co.***, 12 NY3d 316, 880 NYS2d 879 [2009]).

relevant one-year statute of limitations (*see* CPLR 215; ***Kwarren v American Airlines***, 303 AD2d 722, 757 NYS2d 105 [2d Dept 2003]).

Nonetheless, it appears that the gravamen of the plaintiff's allegations regarding his alleged mental anguish involve the defendants' refusal to remove or amend the information on PFML's website in February 2013. Thus, the plaintiff's second cause for intentional infliction of emotional distress was timely commenced to that extent. However, the defendants move to dismiss said second cause of action on the ground that the plaintiff has failed to state a cause of action.

Pursuant to CPLR §3211(a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994], and the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). However, the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see* ***Leon v Martinez***, *supra*; ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314 [1976]; ***DaCosta v Trade-Winds Envtl. Restoration, Inc.***, 61 AD3d 627, 877 NYS2d 373 [2d Dept 2009]). When evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see* ***Guggenheimer v Ginzburg***, *supra*; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; ***Scoyni v Chabowski***, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; ***Peter F. Gaito Architecture, LLC v Simone Dev. Corp.***, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]). Dismissal under CPLR 3211 is not warranted unless it is established "conclusively that the plaintiff has no cause of action" (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010] quoting ***Lawrence v Graubard Miller***, 11 NY3d 588, 873 NYS2d 517 [2008]; ***Rovello v Orofino Realty Co.***, *supra*).

The plaintiff concedes that the defendants are providers of an interactive computer service pursuant to 47 USC § 230, the Communications Decency Act (CDA). The CDA preempts state law, including the imposition of tort liability, inconsistent with its provisions (47 USC § 230 [e] [3]). The Court of Appeals has held that the CDA bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content" (citations omitted)" (***Shiamili v Real Estate Group of N.Y., Inc.***, 17 NY3d 281, 289, 929 NYS2d 19, 25 [2011]). However, service providers "are only entitled to this broad immunity ... where the content at issue is provided by 'another information content provider' (47 USC § 230 [c] [1]). It follows that if a defendant service provider is itself the 'content provider,' it is not shielded from liability" (*Id.* at 289, 929 NYS2d at 25).

The plaintiff's second and final cause of action, a claim for intentional infliction of emotional distress "predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (***Freihofer v Hearst Corp.***, 65 NY2d 135, 490 NYS2d 735 [1985]). The conduct alleged by plaintiff against the

defendants is that they refused to remove or amend the web pages containing the web article, an editorial function protected by the CDA. This conduct does not rise to the level of atrocity or outrageousness necessary to sustain a claim of this nature (*see* (***Shiamili v Real Estate Group of N.Y., Inc.***, *supra*; ***Howell v New York Post Co.***, 81 NY2d 115, 596 NYS2d 350 [1993]). The plaintiff's complaint fails to allege sufficient facts to demonstrate that defendants' conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . and [was] utterly intolerable in a civilized community" (***Murphy v American Home Prods. Corp.***, 58 NY2d 293, 461 NYS2d 232 [1983], quoting Restatement [Second] of Torts § 46, Comment d; *see* ***Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue***, 11 NY3d 15, 862 NYS2d 311 [2008]; ***Baumann v Hanover Community Bank***, 100 AD3d 814, 957 NYS2d 111 [2d Dept 2012]). Thus, it is determined that the complaint fails to state a cause of action for intentional infliction of emotional distress.

The plaintiff's contention that the defendants are not entitled to the protection of the CDA because they uploaded the Newsday article and Newsday did not post the article on PFML's website is without merit. Accordingly, the plaintiff second cause of action for the intentional infliction of emotional distress is dismissed.

The first and second causes of action having been dismissed herein, the complaint is dismissed in its entirety.

Dated: June 19, 2014

W. Gerard Asher
J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION