Arvanitakis v Lester
2014 NY Slip Op 32188(U)
July 14, 2014
Sup Ct, Queens County
Docket Number: 703787/13
Judge: Leonard Livote

ORIGINAL

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: Honorable LEONARD LIVOTE IAS TERM, PART 33
Acting Supreme Court Justice

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Katerina Arvanitakis, Index No: 703787/13

Plaintiff,

-- against -- Motion Date: 03/12/14

Roy J. Lester, Laurie-Ann Stein Paul,
Bibbo and Nadine Lugo, Seq. No: 1 & 2

Defendants.

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FILED
JUL 23 2014
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF11 to EF 39 were read on this motion by Roy J. Lester and separate motion by Paul Bibbo and Nadine Lugo (collectively referred to herein as the Bibbo/Lugo defendants), to dismiss the complaint pursuant to CPLR 3211 (a)(1), (a)(5) and (a)(7).

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	EF11 - EF15
Answering Affidavits - Exhibits	EF22 - EF36
Reply Affidavits	EF37-EF39

Upon the foregoing papers it is ordered that the motions are granted for reasons which follow.

Plaintiff in this, inter alia, defamation action seeks damages for defamatory remarks allegedly made by defendants in June, July and August, of 2012. By the instant motions, defendants move to dismiss the complaint on the grounds that the action is time-barred, fails to state a cause of action and fails to specify the words used which were allegedly defamatory. Plaintiff opposes the motion.

Discussion

Defendants established, prima facie, that the instant action is untimely in that it was not commenced within the one-year statute of limitations applicable to actions for defamation (*see* CPLR 215[3], 207; *Wilson v Erra,* 94 AD3d 756 [2012]). A cause of action alleging defamation accrues at the time the alleged statements are originally uttered (*see Gigante v Arbucci,* 34 AD3d 425, 426 [2006]; *Teneriello v Travelers Cos.,* 226 AD2d 1137 [1996]).

Here, the alleged defamatory statements were uttered, and any injury to the plaintiff occurred, in June, July and August of 2012when defendants allegedly made defamatory comments about plaintiff. Since this action was not commenced until September 9, 2013, a date more than one year later, the action is dismissed pursuant to CPLR 3211 (a)(5), as time-barred (*see Hemmings v Gapihan*, 116 AD3d 828 [2d Dept. 2014]); *Giglio v Delesparo,* 46 AD2d 928 [3d Dept. 1974]).

In opposition, plaintiff failed to raise a triable issue of fact as to whether the statute of limitations was tolled (*see Bullfrog, LLC v Nolan,* 102 AD3d 719 [2d Dept. 2013]). Plaintiff may not circumvent the one-year limitation period applicable to defamation actions by misdescribing the tort as injurious falsehood or interference with economic relations (*Noel v. Inteboro Mut. Indem. Ins. Co.,* 31 A.D.2d 54 [1st Dept. 1968]). "A person possessing a cause of action in libel or slander may not avoid the statute of limitations applicable to such a cause of action by the device of claiming that the cause of action is an action on the case to which a longer statute of limitations is applicable" (*Dubourcq v Brouwer*, 124 NYS2d 61, 62 [McNally, J.], affd. 282 App. Div. 861; *Metromedia, Inc. v Mandel*, 21 AD2d 219, 222 [1st Dept. 1964]; *Crosby v Reilly*, 20 AD 2d 561 [2d Dept. 1963]).

There is no support for plaintiff's proposition that the statute of limitations governing actions for defamation is subject to a "continuing tort" exception (*Cheves v Trustees of Columbia Univ.*, 89 AD3d 463 [1st Dept 2011]).

Furthermore, "[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation" (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 55 US 1170 [2009]; *see Gross v New York Times Co.*, 82 NY2d 146, 152-153 [1993]). In determining whether a statement constitutes a nonactionable opinion, a question of law for the court (*see Mann v Abel*, 10 NY3d at 276), the "factors to be considered are: (1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact" (*Brian v Richardson*, 87 NY2d 46, 51 [1995] [internal quotation marks omitted]; *see Thomas H. v Paul B.*, 18 NY3d 580 [2012]). The dispositive inquiry is " 'whether the reasonable [listener] would have believed that the challenged statements were conveying facts about the . . . plaintiff' " (*Brian v Richardson*, 87 NY2d at 51, quoting *Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 254 [1991], *cert denied* 500 US 954 [1991]; *see 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 139 [1992], *cert denied* 508 US 910 [1993]). Here, given the context in which the challenged statements were made, a reasonable listener would have believed that they were opinion, and not a factual accusation of criminal conduct (see *Brian v Richardson*, 87 NY2d at 53; *Gross v New York Times Co.*, 82 NY2d at 155; *Springer v Almontaser*, 75 AD3d 539, 541 [2010]; *Trustco Bank of N.Y. v Capital Newspaper Div. of Hearst Corp.*, 213 AD2d 940, 942-943 [1995]).

The complaint also fails to comply with CPLR 3016 (a), which requires that a complaint sounding in defamation "set forth 'the particular words complained of' " (*Simpson v Cook Pony*

Farm Real Estate, Inc., 12 AD3d 496, 497 [2004], quoting CPLR 3016 [a]; *see Fusco v Fusco*, 36 AD3d 589 [2007]). Compliance with CPLR 3016 (a) is strictly enforced (*see Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690 [2007]). Accordingly, those branches of defendants' motions which are pursuant to CPLR 3211 (a) (7) to dismiss the complaint for failure to state a cause of action are granted.

The branch of the motion which seeks to dismiss the cause of action for tortious interference with prospective business relations, is granted. "To establish a claim for tortious interference with prospective business advantage, a plaintiff must demonstrate that (a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (*North State Autobahn, Inc. v Progressive Ins. Group Co.*, 102 AD3d 5, 21 [2012]; *see* PJI 3:57). Here, plaintiff failed to allege any of the elements of this cause of action in her complaint. Specifically, plaintiff failed to set forth any allegations as to the existence of any contract between plaintiff and any third parties of which the defendants were purportedly aware, any acts by the defendants to procure the unjustified breach of the unspecified contract with unidentified individuals, and further failed to set forth any allegations that these unspecified contracts with unidentified individuals were breached.

The branches of the motion which are to dismiss plaintiff's causes of action for prima facie tort and injurious falsehood are granted. Affording the complaint a liberal construction, accepting all facts as alleged in the complaint to be true, and according the plaintiff the benefit of every favorable inference as required on a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint fails to state a cause of action alleging prima facie tort for statements made by the defendants. The complaint fails to adequately plead that the statements were motivated solely by "disinterested malevolence" (*Lisi v Kanca*,
105 AD3d 714 [2d Dept. 2013], citing *Lancaster v Town of E. Hampton*, 54 AD3d 906, 908 [2d Dept. 2008]) . Furthermore, special damages, which are an essential element of both injurious falsehood and prima facie tort, must be pleaded with sufficient specificity (*see Freihofer v Hearst Corp.*, 65 NY2d 135 [1985]; *Nyack Hosp. v Empire Blue Cross & Blue Shield*, 253 AD2d 743 [1998]). Because general allegations of lost sales from unidentified lost customers are insufficient (*see, Drug Research Corp. v Curtis Publ. Co.*, 7 NY2d 435 [1960]; *De Marco-Stone Funeral Home v WRGB Broadcasting*, 203 AD2d 780 [1994]), defendant's motion to dismiss the causes of action for prima facie tort and injurious falsehood, is granted.

The branch of the motion which is to dismiss the cause of action for misappropriation of confidential information, is also granted. The complaint fails to allege that defendants stole the information or that plaintiffs took steps to maintain the secrecy of the information (*see Fada Intl. Corp. v Cheung*, 57 AD3d 406 [2008], *lv. denied* 12 NY3d 706 [2009]).

Since plaintiff failed to properly allege a cause of action for defamation or misappropriation of confidential information, the causes of action for civil conspiracy to commit

defamation or civil conspiracy to commit intentional misappropriation of confidential information are dismissed (*Perez v Lopez*, 97 AD3d 558 [2d Dept. 2012]).

Finally, to plead a claim for an injunction, there must be irreparable injury and inadequacy of a legal remedy" (*Stanklus v County of Montgomery,* 86 AD2d 908, 908 [3d Dept 1982] (explaining that "[i]rreparable injury and inadequacy of a legal remedy are prerequisites to an injunction"). Defendants correctly contend that plaintiff's claim for an injunction should be dismissed because plaintiff does not plead essential elements of a claim for an injunction, and cannot show that the equities favor an injunction.

Accordingly, the motions to dismiss the complaint are granted.

Dated: July 14, 2014

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A.J.S.C.