Chan v Rowena Cheung
2015 NY Slip Op 32557(U)
October 14, 2015
Supreme Court, New York County
Docket Number: 112212/2009
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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Peter Chan, Moon Lee Lau,
and Shang Ching Huang,

Plaintiff,

-against-

Rowena Cheung

Defendants.

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Index No.
112212/2009

DECISION AND
ORDER

Robert D. Kalish, J.:

Upon the foregoing papers, the Plaintiff's motion pursuant to CPLR §§1003 and 3025(b) to amend the complaint naming Joseph Cheung as a defendant in the underlying action is hereby denied as follows:

Background and Procedural History

The Plaintiffs commenced the underlying action on or about August 26, 2009 alleging three causes of action respectively for defamation (first cause of action), tortious interference (second cause of action) and for *prima facie* tort (third cause of action) stemming from emails and an affidavit allegedly sent/prepared by the Defendant Rowena Chang. The Plaintiffs claim in sum and substance that they were all members of Barroness Accessories LLC ("Barroness") and that on or about July 9, 2009, the Defendant sent an email and affidavit to Yiwu Wisa Ornaments Co. Ltd (Yiwu") a Barroness manufacturer, which included defamatory statements and accusations against the Plaintiffs. The Plaintiffs further allege that the Defendant further

published the affidavit to numerous other persons and entities doing business with Barroness. The Plaintiffs now seek to amend the summons and complaint to name Joseph Cheung as an additional Defendant in the underlying action. Specifically, the Plaintiff seeks to amend the summons and complaint to claim against Joseph Cheung for "aiding and abetting" the Defendant's tortious interference" and for "aiding and abetting" the Defendant's *prima facie* tort.

Parties' Contentions

The Plaintiffs argue in support of the instant motion that pursuant to CPLR §3025(b), leave to amend a complaint shall be "freely given". Plaintiffs argue in sum and substance that although they commenced the underlying action nearly six years ago, neither the Defendant nor Joseph Cheung would be prejudiced by allowing the Plaintiffs to name Joseph Cheung as a Defendant in the underlying action. Plaintiffs argue that they only "just discovered" that Joseph Cheung "had a major role in perpetrating the tortious interference and *prima facie* tort alleged in the Complaint" based upon certain emails that were produced by the Defendant to the Plaintiffs on June 9, 2015 (Affirmation of Alexander Granovsky in support of the Plaintiffs' motion p. 3, para 10).[1]

In opposition to the motion, the Defendant argues in sum and substance that Joseph Cheung had no involvement with the events/actions leading to the underlying action. Specifically, the Defendant claims that Joseph Cheung was deposed as a non-party in the underlying action in June of 2013, which produced no reasons to believe that he was in any way "complicit" in any of the actions that the Plaintiffs allege of the Defendant Rowena Cheung.

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[1] The Court notes that the Plaintiffs' attorney mistakenly indicated in his affirmation that the emails were produced by the Plaintiffs and not the Defendant. However, Defense counsel recognized said mistake and the Parties do not dispute that it was the Defendant that produced the emails to the Plaintiffs on June 9, 2015.

The Defendant further argues that the Plaintiffs do not have a viable cause of action against Joseph Cheung as the statutes of limitation for the Plaintiffs' defamation, tortious interference and *prima facie* tort claims have expired as to Joseph Cheung, and the Plaintiffs cannot now add him as a Defendant in the underlying action.

In their reply papers, the Plaintiffs reiterate their arguments that neither the Defendant nor Joseph Cheung will be prejudiced by amending the complaint to add Joseph Cheung as a Defendant in the underlying action. Plaintiffs further argue that the merits of the proposed amendments are not at issue at the current stage of the underlying action. Finally, the Plaintiffs argue that the statues of limitations have not run on their proposed causes of action against Joseph Cheung. Specifically, the Plaintiffs argue that pursuant to CPLR §203(g) the statutes of limitations on their proposed causes of action against Joseph Cheung should be measured from June 9, 2015, the date that the Defendant produced certain emails to the Plaintiffs by which the Plaintiffs "discovered J. Cheung's complicity in the underlying torts" (Plaintiffs' reply memorandum page 8).

Analysis

Motions to amend pleadings may be denied on the grounds that proposed amendments include charges/claims that are beyond the applicable statutes of limitations.

Pursuant to CPLR §3025(b), "motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit" (MBIA Ins. Corp. v. Greystone & Co., Inc., 74 AD3d 499, 499-500 (NY App Div 1st Dept 2010) (internal citations omitted)). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new

allegations "but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (MBIA Ins. Corp. v. Greystone & Co., Inc., 74 AD3d 499, 500 (NY App Div 1st Dept 2010) (internal citations omitted)). However, while leave to amend the pleadings is ordinarily freely given, a Court may deny Plaintiffs' motion to add a new party defendant on the basis that the statute of limitations has run as to the Plaintiffs' claims against the proposed additional defendant (Garcia v New York-Presbyt. Hosp., 114 AD3d 615 (NY App Div 1st Dept 2014). A Court should consider the statute of limitations issues in determining whether or not a proposed amendment is "devoid of merit" (See Whitfield-Ortiz v. Department of Educ. of the City of New York, 116 AD3d 580 (NY App Div 1st Dept 2014)).

In the instant motion, the Plaintiff is seeking to amend the summons and complaint to claim against Joseph Cheung for "aiding and abetting" the Defendant's tortious interference" and for "aiding and abetting" the Defendant's *prima facie* tort. "A claim that a person aided and abetted a tort is governed by the same statute of limitations that is applicable to the underlying tort allegedly aided and abetted" (Pomerance v. McGrath, 124 A.D.3d 481, 484 (NY App Div 1st Dept 2015)). As such, in order to determine if the Plaintiff is still within the statute of limitation to charge Joseph Cheung with "aiding and abetting" the Defendant's tortious interference and *prima facie* tort in the underlying action, the Court must determine if the Plaintiffs are still within the statute of limitation to make claims against Joseph Cheung for tortious interference and *prima facie* tort stemming from the underlying action.

Plaintiffs' had a three year statute of limitation to make a claim against Joseph Cheung for tortious interference and *prima facie* tort measured from July 9, 2009, the date of the alleged economic injury

"[A] claim for tortious interference with a contract is governed by a three-year statute of limitations, as is a tortious interference with prospective contractual relations claim. In determining which statute of limitations is applicable to a cause of action, it is 'the essence of the action and not its mere name' that controls'" (Ullmannglass v Oneida, Ltd., 86 AD3d 827, 828 (NY App Div. 3d Dept 2011) citing Ramsay v. Mary Imogene Bassett Hospital, 113 AD2d 149 (NY App Div. 3d Dept 1985) lvs dismissed 67 NY2d 608 (NY 1986); Andrew Greenberg, Inc. v. Svane, Inc., 36 A.D.3d 1094 (NY App Div 3d Dept 2007); Besicorp Ltd. v. Kahn, 290 A.D.2d 147 (N.Y. App. Div. 3d Dept 2002) lv denied 98 NY2d 601 (NY 2002); CPLR §214 (4); CPLR §215(3)).

Further "[t]he three-year statute of limitations for tortious interference applies when the gravamen of a complaint is economic injury, rather than merely reputational harm" (See Amaranth LLC v J.P. Morgan Chase & Co., 71 AD3d 40, 48 (NY App Div 1st Dept 2009) citing Mannix Indus. v. Antonucci, 191 AD2d 482 (NY App Div 2d Dept 1993) lv dismissed 82 NY2d 846 (NY 1993); Classic Appraisals Corp. v. DeSantis, 159 AD2d 537 (NY App Div 2d Dept 1990)). Similarly, claims of *prima facie* tort based upon economic injury are also subject to the three-year statute of limitations (See Stacom v Wunsch, 173 AD2d 401 (NY App Div 1st Dept 1991) lv denied 78 NY2d 859 (NY 1991); Jemison on behalf of Jemison v. Crichlow, 139 AD2d 332 (NY App Div 2d Dept 1988)). "In applying a Statute of Limitations a Court looks "for the reality, and the essence of the action and not its mere name." (See Amaranth LLC v J.P. Morgan Chase & Co., 71 AD3d 40, 48 (N.Y. App Div 1st Dept 2009) (internal citations omitted); see

also Ullmannglass v Oneida, Ltd., 86 AD3d 827 (NY App Div 3d Dept 2011)).

"As a general principle, the statute of limitations begins to run when a cause of action accrues, that is, 'when all of the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court'" (Hahn Automotive Warehouse, Inc. v American Zurich Ins. Co., 18 NY3d 765, 770 (NY 2012); Kronos, Inc. v AVX Corp., 81 NY2d 90 (NY 1993); LaBello v. Albany Medical Ctr. Hosp., 85 NY2d 701 (NY 1995)). Further, "tort claims accrue upon an injury being sustained, not upon the defendant's wrongful act or the plaintiff's discovery of the injury" (City Store Gates Mfg. Corp. v Empire Rolling Steel Gates Corp., 113 A.D.3d 718 (N.Y. App. Div. 2d Dept 2014) citing Ackerman v. Price Waterhouse, 84 N.Y.2d 535 (NY 1994); Kronos, Inc. v. AVX Corp., 81 NY2d 90 (NY 1993)).

Upon review of the Plaintiffs' pleadings and submitted papers, the Court finds that the Plaintiffs' second and third causes of action for tortious interference and *prima facie* tort both stemmed from an email and affidavit that the Defendant allegedly sent to Yiwu on or about July 9, 2009. Further, the Plaintiffs' second cause of action for tortious interference and third cause of action for *prima facie* tort both allege economic and not purely reputational harm, specifically that the Defendant's alleged actions interfered with the Plaintiffs' ongoing relationship with Yiwu, which the Plaintiffs allege the Defendant knew of. As such, the Court finds that the Plaintiffs' second cause of action for tortious interference and third cause of action for *prima facie* tort were subject to a three year statute of limitation (See Besicorp Ltd. v. Kahn, 290 AD2d 147 (NY App Div 3d Dept 2002) lv denied 98 NY2d 601 (NY 2002)) all measured from July 9, 2009.

As such, the Plaintiffs are now outside of the statute of limitations to bring claims of aiding and abetting tortious interference and/or *prima facie* tort against Joseph Cheung stemming from the underlying action, and the Plaintiffs cannot now amend the complaint to make said claims against Joseph Cheung in the underlying action.[2]

CPLR §203 (g) does not apply to tortious interference or *prima facie* tort as the statutes of limitation for said claims are not computed from the time facts were discovered or from the time when facts could with reasonable diligence have been discovered

CPLR §203 (g) reads as follows:

> Method of computing periods of limitation generally
>
> (g) Time computed from actual or imputed discovery of facts. Except as provided in article two of the uniform commercial code or in section two hundred fourteen-a of this chapter, where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times, the action must be commenced within two years after such actual or imputed discovery or within the period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

By its specific statutory language, CPLR §203 (g) indicates that it only applies to charges "where the time within which an action must be commenced is computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered, or from either of such times". As previously stated, actions for tortious interference alleging economic injury must be made within three years of the injury being sustained, not upon

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[2] The Court notes that the Plaintiffs are not seeking to amend the summons and complaint to add any "aiding and abetting" charges against Joseph Cheung as to the Plaintiffs' first cause of action against the Defendant for defamation. However the Plaintiff is also outside of the statute of limitation to do so on said charge (See Nussenzweig v. diCorcia, 9 NY3d 184, 188 (NY 2007) citing Gregoire v. G. P. Putnam's Sons, 298 NY 119 (NY 1948); see also Ullmannglass v Oneida, Ltd., 86 AD3d 827, 828 (NY App Div. 3d Dept 2011) citing Ramsay v. Mary Imogene Bassett Hospital, 113 AD2d 149 (NY App Div. 3d Dept 1985) lvs dismissed 67 NY2d 608 (NY 1986); Andrew Greenberg, Inc. v. Svane, Inc., 36 A.D.3d 1094 (NY App Div 3d Dept 2007); Besicorp Ltd. v. Kahn, 290 A.D.2d 147 (NY App Div 3d Dept 2002) lv denied 98 NY2d 601 (NY 2002); CPLR §215(3)).

the defendant's wrongful act or the plaintiff's discovery of the injury (See City Store Gates Mfg. Corp. v Empire Rolling Steel Gates Corp., 113 A.D.3d 718 (N.Y. App. Div. 2d Dept 2014) citing Ackerman v. Price Waterhouse, 84 N.Y.2d 535 (NY 1994); Kronos, Inc. v. AVX Corp., 81 NY2d 90 (NY 1993); CPLR §214).

In the instant action, the Plaintiff's second and third causes of action for tortious interference and *prima facie* tort fall squarely under CPLR §214(4) as "action[s] to recover damages for an injury to property". The statute of limitations for the Plaintiffs' causes of action for tortious interference and *prima facie* tort are not "computed from the time when facts were discovered or from the time when facts could with reasonable diligence have been discovered" and therefore CPLR §203 (g) does not extend the statutes of limitation for the Plaintiffs' causes of action in the instant case (See Barrett v. Huff, 6 AD3d 1164 (NY App Div. 4th Dept 2004)).

Conclusion

Accordingly and for the reasons so stated, it is hereby

ORDERED that the Plaintiffs' motion to to amend the complaint naming Joseph Cheung as a defendant in the underlying action is denied. It is further

ORDERED that the parties are schedule to appear before this Court for a status conference on November 23, 2015 at 9:30 a.m.

The foregoing constitutes the ORDER and decision of the Court.

Dated: October 14, 2015

, JSC
HON. ROBERT D. KALISH
J.S.C.