

Brummer v Wey

2017 NY Slip Op 30062(U)

January 11, 2017

Supreme Court, New York County

Docket Number: 153583/2015

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

CHRISTOPHER BRUMMER,
Plaintiff,

Index No. 153583/2015
MOTION DATE 11/16/2016
MOTION SEQ. NO. 010
MOTION CAL. NO. _____

-against-

BENJAMIN WEY, FNL MEDIA LLC, and
NYG CAPITAL LLC d/b/a NEW YORK GLOBAL GROUP,
Defendants.

The following papers, numbered 1 to 17 were read on this motion for leave to amend the pleadings, and for an extension of time to serve.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4; 5 - 8</u>
Answering Affidavits — Exhibits _____	<u>9 - 11</u>
Replying Affidavits _____	<u>12 - 14; 15 - 17</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is ordered that Plaintiff’s motion under Motion Sequence No. 010 for leave to amend the Complaint is granted, and Plaintiff’s motion under Motion Sequence No. 011 to extend time to serve Defendant Benjamin Wey (herein “Defendant Wey”), is denied as moot.

Plaintiff commenced this action on April 13, 2015, alleging that, in an effort to injure Plaintiff’s professional reputation, the Defendants defamed Plaintiff by publishing an article containing various false statements (herein “the Fraud Article”) in January of 2015 on “TheBlot”, a digital magazine authored by Defendant Wey. The Complaint further alleged that TheBlot is owned by Defendant FNL Media LLC (herein “Defendant FNL”), that Defendant NYG Capital LLC d/b/a New York Global Group (herein “Defendant NYGG”) is the parent company of FNL, and that Defendant Wey controls both companies.

On August 10, 2015, the Defendants moved under Motion Sequence No. 004 to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7), or in the alternative to dismiss the Complaint as against Defendant Wey for ineffective service of process pursuant to CPLR 3211(a)(8). The motion was denied on the 3211(a)(1) and (7) grounds, and was granted on the CPLR 3211(a)(8) ground to the extent of ordering a traverse hearing to determine whether or not service on Defendant Wey was proper. (NYSCEF Doc # 148). Thereafter, an Answer was filed on behalf of Defendants FNL and NYGG. (NYSCEF Doc # 153).

Plaintiff now moves under Motion Sequence No. 010 pursuant to CPLR 3025(b) for an Order allowing him to file and serve an amended complaint to add new defamation allegations against the Defendants.

Plaintiff contends that the Defendants have continued to engage in posting defamatory statements and/or articles of Plaintiff on various web sites and social media outlets since the commencement of this action. That the Defendants added new and specific allegations to the original Fraud Article (Mot. Seq. No. 010 Exh. B), that the Defendants have posted two new defamatory articles - in September of 2015 and June of 2016 (Mot. Seq. No. 010 Exhs. C & D), and that the Defendants have republished and spread these defamatory statements on other social media sites (Mot. Seq. No. 010 Exhs. F, G, and H), as well as on a website created specifically by the Defendants in August of 2015 and March of 2016 to defame the Plaintiff (Mot. Seq. No. 010 Exh. E).

Plaintiff argues that these additional defamatory statements occurred within the one year statute of limitations since the original Fraud Article was published in January of 2015, and that all of the Defendants are on notice of the additional claims because these additional claims relate back to the claims in the Complaint. Plaintiff also contends that although Defendant Wey claimed he was not properly served with the Complaint, he is "united in interest" and is on notice of the claims as owner of the corporate Defendants. Plaintiff contends that discovery is in the very beginning stages, and allowing an amendment of the Complaint would not result in prejudice or surprise to the Defendants since the additional claims relate to further defamatory statements made by them.

Plaintiff also moves under Motion Sequence No. 011 pursuant to CPLR 306-b for an Order extending his time to serve Defendant Wey with the original Complaint. Plaintiff contends, among other things, that the issues with service were argued during the traverse hearing, and that the process server testified that he incorrectly cited serving Defendant's Co-tenant, but had in fact served the doorman. That the process server's logbook correctly reflects the doorman being served (Mot. Seq. No. 011 Exh. B), and that the GPS photo indicating the process server's presence shows he was at Defendant Wey's building at the time of service (Mot. Seq. No. 11 Exh. C). Plaintiff also contends that in an effort to move the case along he is moving for an extension to properly re-serve Defendant Wey.

Defendants oppose the motions arguing that this suit was commenced more than fifteen months ago, and that Plaintiff has failed to make diligent efforts to serve Defendant Wey although Plaintiff has been on notice since at least August of 2015 that Defendant Wey claimed service was ineffective. Defendants also argue that the Complaint should not be allowed to be amended because the proposed amendment does not clearly show the changes or additions to be made, and because as an un-served Defendant, the claims can only relate back to Defendant Wey if he is unified in interest with the co-defendants. That Defendant Wey and the corporate defendants have separate and independent defenses to the claims, that there is no unity of interest, and that Plaintiff is a public figure who fails to plead actual malice in the proposed amendment.

Leave to amend pleadings pursuant to CPLR 3025(b) should be freely given “absent prejudice or surprise resulting directly from the delay” (*Anoun v. City of New York*, 85 A.D.3d 694, 926 N.Y.S.2d 98, 99 [1st Dept., 2011] citing to, *Fahey v. County of Ontario*, 44 N.Y.2d 934, 935, 408 N.Y.S.2d 314, 380 N.E.2d 146 [1978]), “or if the proposed amendment is palpably improper or insufficient as a matter of law” (*McGhee v. Odell*, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1st Dept., 2012] citing to, *Shepherd v. New York City Tr. Auth.*, 129 A.D.2d 574, 574, 514 N.Y.S.2d 72 [2nd Dept., 1987]). “Prejudice arises when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position, and these problems might have been avoided had the original pleading contained the proposed amendment” (*Valdes v. Marbrose Realty, Inc.*, 289 A.D.2d 28, 29, 734 N.Y.S.2d 24 [1st Dept., 2001]). A motion to amend pursuant to CPLR 3025(b) is palpably insufficient to add claims that are time barred. (*Calamari v. Panos*, 131 A.D.3d 1088, 16 N.Y.S.3d 824 [2nd Dept. 2015]).

CPLR 203(c) provides that claims asserted in the complaint are interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced. CPLR 203(f), provides that claims asserted in an amended complaint are “deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.” “Thus, when the nature of a newly asserted cause of action is distinct from the causes of action asserted in the original complaint, and requires different factual allegations as to the underlying conduct than were contained in the original complaint, the new claims will not ‘relate back’ in time to the interposition of the causes of action in the original complaint.” (See *Calamari, Supra*). Where an amended complaint does not “allege any new facts or occurrences, but merely set[s] forth an additional legal theory, the initial pleading provide[s] sufficient notice of the series of occurrences from which the...claims arise.” (*Jacobson v. McNeil Consumer & Specialty Pharmaceuticals*, 68 A.D.3d 652, 891 N.Y.S.2d 387 [1st Dept. 2009]).

“A party opposing leave to amend must overcome a heavy presumption of validity in favor of [permitting amendment]” (*McGhee v. Odell*, 96 A.D.3d 449, 450, 946 N.Y.S.2d 134, 135, [1st Dept., 2012] citing to, *Otis El. Co. v. 1166 Ave. of Ams. Condominium*, 166 A.D.2d 307, 307, 564 N.Y.S.2d 119 [1st Dept, 1990]). Defendants will not suffer any prejudice when an amended complaint adds a claim premised upon the very same subject matter alleged by the original complaint (*Brown v Blennerhasset Corp.*, 113 A.D.3d 454, 979 N.Y.S.2d 27 [1st Dept., 2014]).

Allowing an amendment to the Complaint to add new alleged occurrences of defamation is not palpably improper as the statute of limitations had not run on these new allegations at the time Plaintiff brought this Motion. The proposed amended claims seek to add allegations of defamatory articles published in September of 2015 and June of 2016, and alleged defamatory websites that were created in August of 2015 and March of 2016. These new allegations are new occurrences of defamation, and should be added to the Complaint instead of being the subject of a separate Complaint.

Therefore, Plaintiff is granted leave to amend. The Defendants have failed to show how they would be prejudiced, hindered, or how their position would change by allowing the amendment.

As for Plaintiff's motion to extend time to serve Defendant Wey with the original Complaint, amending the Complaint now renders the relief sought moot.

Accordingly, it is ORDERED that Plaintiff's motion under Motion Sequence No. 010 for leave to amend the Complaint is granted, and it is further,

ORDERED, that the pleadings are amended as reflected in the proposed Amended Complaint annexed to Plaintiff's moving papers as Exhibit I, and it is further,

ORDERED, that Plaintiff shall serve a copy of this Order with Notice of Entry on all parties within 20 days from the date of entry of this Order, and it is further,

ORDERED, that the pleadings as amended in the Proposed Amended Complaint annexed to the Plaintiff's moving papers as Exhibit I shall be deemed served upon Defendants FNL Media LLC, and NYG Capital LLC d/b/a New York Global Group upon service on their attorneys of a copy of this Order with Notice of Entry thereof, and it is further,

ORDERED, that Defendants FNL Media LLC, and NYG Capital LLC d/b/a New York Global Group shall serve an Answer to the Amended Complaint within 30 days of service, and it is further,

ORDERED, that Plaintiff shall serve Defendant Benjamin Wey with a copy of the Amended Complaint in accordance with the CPLR within 30 days of service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that Plaintiff's motion under Motion Sequence No. 011 for an Order extending Plaintiff's time to serve Defendant Wey, is denied as moot.

ENTER:



MANUEL J. MENDEZ

Dated: January 11, 2017

J.S.C. MANUEL J. MENDEZ

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE