

**Caixin Media Co. Ltd. v Guo Wengui**

2018 NY Slip Op 30349(U)

January 11, 2018

Supreme Court, New York County

Docket Number: 652154/2017

Judge: Gerald Lebovits

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NEW YORK STATE SUPREME COURT  
NEW YORK COUNTY: PART 7

CAIXIN MEDIA COMPANY LTD. and HU SHULI,

Plaintiffs,

Index No.: 652154/2017  
**DECISION/ORDER**  
Motion Sequence No. 002

-against-

GUO WENGUI  
a/k/a/ GUO HAOYUN  
a/k/a/ MILES KWOK  
a/k/a/KWOK HO WAN  
a/k/a/ KWOK HO  
a/k/a/ GWO WEN GUI  
a/k/a/ GUO WEN-GUI  
a/k/a/ WAN GUE HAOYUN  
a/k/a/ HAOYUN GUO,

Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant’s motion to dismiss the complaint or, alternatively, to extend defendant’s time to serve an answer.

<b>Papers</b>	<b>Numbered</b>
Defendant’s Notice of Motion .....	1
Affirmation of Plaintiffs’ Counsel .....	2
Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion to Dismiss .....	3
Defendant’s Reply Affirmation in Further Support of Defendant’s Motion to Dismiss .....	4
Defendant’s Reply Memorandum of Law in Further Support of Motion to Dismiss .....	5

*Skadden, Apps, Slate, Meagher & Flom LLP*, New York (Anthony J. Dreyer of counsel), for plaintiffs.

*Tucker Levin, PLLC*, New York (Duncan P. Levin of counsel), for defendant.

Gerald Lebovits, J.

Plaintiffs commenced this action on April 24, 2017, for injunctive relief and monetary damages for defendant’s alleged defamation (libel, libel *per se*, and trade libel) and intentional infliction of emotional distress. Plaintiff Hu Shuli founded plaintiff Caixin Media Company Ltd. (Caixin) in 2009. Ms. Hu serves as Caixin’s editor in chief. Caixin is a media group “providing financial and business news through periodicals, online content, mobile apps, conferences, books and TV/video programs.” (Defendant’s Notice of Motion, Exhibit C)

Plaintiffs claim that defendant repeatedly published fabricated, false, and offensive statements about them on social-media platforms like Twitter and Facebook, asserting that “Ms.

Hu has, among other things, engaged in an extramarital affair, borne an illegitimate child, abused drugs, caused her and her alleged partner to have to go to the emergency room for medical treatment, and abused her position at Caixin to further her allegedly illegal activities.” (Defendant’s Notice of Motion, Exhibit A, Verified Complaint, at ¶ 3.) Plaintiffs also claim that defendant published Ms. Hu’s personal credit-card statement on Twitter and Facebook and that defendant threatened to reveal details about her supposed sexual and alleged illegal activities. (Defendant’s Notice of Motion, Exhibit A, Verified Complaint, at ¶¶ 5 & 21.) Plaintiffs assert that defendant published these allegedly defamatory statements to attack the professional reputations of plaintiffs in reaction to an investigation report Caixin published in March 2015 about defendant’s conspiracy with corrupt officials. (Defendant’s Notice of Motion, Exhibit A, Verified Complaint, at ¶¶ 6-7.)

Defendant moves to dismiss the complaint under CPLR 3211 (a) (3) on the ground that plaintiff Caixin has no legal capacity to sue and under CPLR 3211 (a) (7) on the ground that plaintiffs fail to state a cause of action; or, alternatively, to extend defendant’s time to serve an answer.

This court ordered on October 31, 2017, that plaintiffs shall have 10 days from the date of service of a copy of the order to resubmit the translated affidavits. Plaintiffs resubmitted the translated affidavits on November 7, 2017. This court finds that the resubmitted translated affidavits comply with CPLR 2101 (b). This court will therefore consider defendant’s motions.

#### I. Motion to dismiss the complaint

On a motion to dismiss under CPLR 3211, a court accepts as true the facts alleged in the complaint, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) A complaint should not be dismissed so long as a cause of action exists, when the plaintiffs are given the benefit of every possible favorable inference. (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976].)

##### A. Timing of defendant’s motion to dismiss under CPLR 3211 (a) (3) & (7)

###### 1. Timing of defendant’s motion to dismiss under CPLR 3211(a) (3)

Defendant moves to dismiss under CPLR 3211(a) (3) on the ground that Caixin lacks legal capacity to sue. Plaintiffs argue that defendant’s motion to dismiss under CPLR 3211(a) (3) should be denied as untimely because it was made after the answer was due.

Under CPLR 3211 (e), a party may, at any time before service of the responsive pleading, is required move on one or more of the grounds under CPLR 3211 (a); any objection or defense based upon a ground under CPLR 3211 (a) (3) is waived unless raised either by such motion or in the responsive pleading. Defendant filed neither a motion to dismiss under CPLR 3211 (a) (3) nor an answer before an answer was due on June 5, 2017. Defendant filed this motion to dismiss under CPLR 3211 (a) (3) on June 15, 2017, 10 days after an answer was due.

As further opined below, defendant’s motion to extend the time to serve an answer is granted, and defendant raised this defense without causing much delay. Thus, this court permits defendant to raise the defense under CPLR 3211 (a) (3) on the ground that Caixin lacks legal capacity to sue.

2. Timing of defendant’s motion to dismiss under CPLR 3211(a) (7)

Defendant’s motion to dismiss under CPLR 3211 (a) (7) for plaintiffs’ failure to state a cause of action is timely.

Plaintiffs argue that defendant’s motion to dismiss under CPLR 3211(a) (7) should be dismissed as untimely because it was made after the answer was due.

Under CPLR 3211 (e), a motion to dismiss under CPLR 3211 (a) (7) may be made at any time during the pendency of an action. Defendant may make this motion to dismiss any time under CPLR 3211 (a) (7) on the ground that plaintiffs fail to state a cause of action. Defendant’s motion to dismiss under CPLR 3211 (a) (7) is timely.

B. Defendant’s motion to dismiss the complaint under CPLR 3211 (a) (3)

Defendant claims that Caixin lacks the capacity to maintain this action because it is not authorized to do business in this state. Plaintiffs argue that Caixin was incorporated in China. Defendant does not dispute that.

Business Corporation Law (“BCL”) § 1312 (a) provides that “[a] foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state.” Absent adequate proof to establish that Caixin is doing business in New York, the presumption is that Caixin is doing business in China, the place of its incorporation. (See *Cadle Co. v Hoffman*, 237 AD2d 555, 555 [2d Dept 1997].) To establish adequately that Caixin is doing business in this state, defendant must prove that Caixin’s activities in this state are so systematic and regular as to manifest continuity of activities in this state. (See *Nick v Greenfield*, 299 AD2d 172, 172 [1st Dept 2002].)

Defendant claims that Caixin has held conferences in New York; plaintiffs do not disagree. But defendant does not establish whether Caixin holds conferences in New York on a regular basis. Occasionally holding a conference in New York does not establish that Caixin has engaged in the systematic and regular business in New York that would require a registration in this state under BCL § 1312 (a).

Defendant also claims that Caixin maintains four news correspondents in New York to conduct New York reporting and that it provides copies of online profiles of Dawei Li, Vincent Ni, Qiaoyi Zhuang, and Xiaoxiao Li. (Defendant’s Reply Affirmation in Further Support of Defendant’s Motion to Dismiss, Exhibit B.)

Plaintiffs do not dispute in their opposition papers dated July 11, 2017, in motion sequence 001, that Caixin maintains these news correspondents in New York. Plaintiffs argue that the presence of a few freelance correspondents or employees on temporary assignment in New York does not show systematic and continuous activities of Caixin in New York. Defendant further argues that plaintiffs fail to rebut defendant's assertion that Caixin does business in New York State, and Caixin's placement and maintenance of dedicated correspondents in New York State in furtherance of its systematic and regular business operation in New York State.

The LinkedIn profile of Dawei Li shows that he has been a correspondent for Caixin in New York since January 2011. (Defendant's Reply Affirmation in Further Support of Defendant's Motion to Dismiss, Exhibit B.) Maintaining news correspondents on a continuous basis in New York constitutes systematic and regular activities in this state as to manifest continuity of activities in this state. Therefore, Caixin is doing business in New York under BCL § 1312 (a).

BCL § 1312 (a) provides that a foreign corporation may not maintain an action until "it has paid to the state all fees and taxes imposed under the tax law or any related statute, as defined in section eighteen hundred of such law, as well as penalties and interest charges related thereto, accrued against the corporation."

But Caixin's failure to comply with BCL § 1312 (a) may be cured before the resolution of the action. (*See Uribe v Merchants Bank of New York*, 266 AD2d 21, 22 [1st Dept 1999] ["In any event, the failure of plaintiff to obtain a certificate pursuant to BCL 1312 may be cured prior to the resolution of the action."].) Caixin's legal capacity to sue is subject to its obtaining a certificate under BCL § 1312 (a) before any resolution of the action is rendered.

Accordingly, defendant's motion to dismiss under CPLR 3211 (a) (3) is denied to the extent that Caixin's legal capacity to sue is subject to its obtaining a certificate and complies with BCL § 1312 (a) before any resolution of the action is rendered.

Plaintiff has 60 days from the date of service of a copy of this decision and order to comply with BCL § 1312 (a) to maintain this action in this state. If plaintiff fails to comply with BCL § 1312 (a), defendant may renew its motion to dismiss.

C. Defendant's motion to dismiss the complaint for defamation under CPLR 3211 (a) (7)

Plaintiffs assert three causes of action against defendant for defamation: (1) libel; (2) libel *per se*; and (3) trade libel. The elements of a cause of action for defamation are (i) a false statement, (ii) published to a third party without privilege or authorization, (iii) constituting fault as judged by, at a minimum, a negligence standard (iv) that must cause special harm or constitute defamation *per se*. (*D'Amico v Correctional Med. Care, Inc.*, 120 AD3d 956, 962 [4th Dept 2014].)

Defendant argues that (1) plaintiffs fails to plead actual malice; (2) the alleged defamatory statements were merely opinions or statements of future intents rather than statements of facts; and (3) plaintiffs fail to plead special damages.

### 1. Actual Malice

To the extent that Ms. Hu is a public figure, plaintiffs must also prove defendant made the statements with actual malice — with knowledge that it was false or with reckless disregard of whether it was false. (*See New York Times Co. v Sullivan*, 376 US254, 279-280 [1964].) Plaintiffs do not dispute that Ms. Hu is a public figure.

Plaintiffs have no obligation, on a motion to dismiss for failure to state a cause of action in a defamation action, to show evidentiary facts supporting their allegations of malice. (*Kotowski v Hadley*, 38 AD3d 499, 500 [2d Dept 2007].) Plaintiffs' allegation of defendant's actual malice by showing that defendant made the alleged defamatory statement in reaction to Caixin's negative report of defendant is sufficient to survive a motion to dismiss.

### 2. Defamatory Statements

In determining whether a statement is opinion or fact, courts may consider (i) whether the specific language at issue has a precise and readily understood meaning; (ii) whether the statements are capable of being proven true or false; and (iii) whether either the full context of the communication where the statement appears or the broader social context and surrounding circumstances are such as to signal readers that what is being read is likely to be opinion, not fact. (*Gross v New York Times Co.*, 82 NY2d 146, 153 [1993].) A motion to dismiss will be denied if the communication at issue, taking the words in their ordinary meaning and in context, is susceptible to a defamatory connotation. (*Davis v Boehme*, 24 NY3d 262, 272 [2014].)

Defendant does not dispute that he made the alleged statements that “Ms. Hu has, among other things, engaged in an extramarital affair, borne an illegitimate child, abused drugs, caused her and her alleged partner to have to go to the emergency room for medical treatment, and abused her position at Caixin to further her allegedly illegal activities.” (Defendant's Notice of Motion, Exhibit A, Verified Complaint, at ¶ 3.) These statements have precise and readily understood meaning, capable of being proven true or false, and signal readers on social-media platforms that what is being read is likely to be fact. This court finds that defendant's alleged statements are susceptible to a defamatory connotation.

### 3. Special Damages

Libel. In a claim for libel, the existence of damage is conclusively presumed from the publication itself, and plaintiffs may rely on general damages. (*Matherson v Marchello*, 100 AD2d 233, 237 [2d Dept 1984].) Plaintiffs need not plead special damages for a cause of action for libel.

Libel *per se*. A plaintiff suing in slander must plead special damages unless the defamation falls into one of four *per se* categories: (1) plaintiff committed a crime; (2) the statements tend to injure plaintiff in her trade, business, or profession; (3) plaintiff has contracted a loathsome disease; or (4) the statements impute unchastity to a woman. (*Matherson*, 100

AD2D at 236.) Defendant’s alleged statements that “Ms. Hu has, among other things, engaged in an extramarital affair, borne an illegitimate child, abused drugs, caused her and her alleged partner to have to go to the emergency room for medical treatment, and abused her position at Caixin to further her allegedly illegal activities” fall into one or more of these four *per se* categories concerning Ms. Hu’s alleged unchastity and her likely involvement of a crime, and these statements tend to injure her profession. Plaintiffs need not plead special damages for a cause of action for libel *per se*.

Trade libel. A trade-libel claim requires the knowing publication of false and derogatory facts about plaintiffs’ business of a kind calculated to prevent others from dealing with plaintiffs, to their demonstrable detriment. (*Banco Popular N. Am. v Lieberman*, 75 AD3d 460, 462 [1st Dept 2010].) In pleading special damages in trade libel, actual losses must be identified and causally related to the alleged tortious act. (*Waste Distillation Technology, Inc. v Blasland & Bouck Engineers, P.C.*, 136 AD2d 633, 633 [2d Dept 1988].) Plaintiffs claim that defendant’s alleged false statements caused Caixin to lose subscriptions and damaged “business relationships for Caixin as potential business partners, including advertisers.” (Defendant’s Notice of Motion, Exhibit A, Verified Complaint, at ¶ 60.) This court finds that plaintiffs’ complaint fails to plead special damage for trade libel. However, a court may exercise discretion to grant plaintiff the right to replead their complaint with respect to special damages. (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 93 [1st Dept 2015].)

Plaintiffs’ complaint is dismissed for failure to state a cause of action for trade libel, with leave to replead special damages within 10 days from the date of service of a copy of this order with a notice of entry.

Accordingly, defendant’s motion to dismiss the complaint under CPLR (a) (7) for plaintiffs’ failure to state a cause of action for liable and liable *per se* is denied. Defendant’s motion to dismiss the complaint under CPLR (a) (7) for plaintiffs’ failure to state a cause of action for trade libel is granted, with leave for plaintiffs to replead special damages within 20 days from the date of service of a copy of this order with notice of entry.

D. Defendant’s motion to dismiss the complaint for intentional infliction of emotional distress under CPLR 3211 (a) (7)

To survive a motion to dismiss, a cause of action for intentional infliction of emotional distress must allege conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” (*164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004].)

Defendant argues that his allegedly false statements about Ms. Hu are not so outrageous and that the cause of action is duplicative of Ms. Hu’s defamation claims.

Plaintiffs argue that defendant’s revelation of Ms. Hu’s private financial information, accusations of criminal and immoral activity, and threats to reveal videos and other information

about Ms. Hu's sexual and medical history are all extreme and outrageous and which caused Ms. Hu's significant distress.

Accepting as true the facts alleged in the complaint, this court finds that defendant's alleged defamatory statements of "Ms. Hu has, among other things, engaged in an extramarital affair, borne an illegitimate child, abused drugs, caused her and her alleged partner to have to go to the emergency room for medical treatment, and abused her position at Caixin to further her allegedly illegal activities" are so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and intolerable in a civilized community.

Plaintiffs also argue that some of defendant's statements are beyond the scope of defamation, including threats of future defamation and the publication of private financial information; to the extent any of defendant's statements are not actionable in defamation, those statements can still support the claim for intentional infliction of emotional distress. This court agrees. Plaintiffs are allowed to claim for both defamation and intentional infliction of emotional distress.

Accordingly, defendant's motion to dismiss the complaint under CPLR 3211 (a) (7) for plaintiffs' failure to state a cause of action for intentional infliction of emotional distress is denied.

## II. Defendant's motion to extend his time to serve an answer

Defendant's motion to extend his time to serve an answer is granted.

Under CPLR 320 (a), defendant was required to appear, answer, or otherwise respond to the complaint within 30 days after the completion of service. Under CPLR 308 (4); service was completed on May 4, 2017, and defendant's time to appear expired on June 5, 2017. (Affirmation of Plaintiffs' Counsel at ¶ 8.) Defendant did not appear, answer, or otherwise respond to the complaint by June 5, 2017. Defendant filed this motion to extend his time to serve an answer on June 15, 2017, 10 days after the answer was due.

Defendant explains that his delay in answering the complaint was due to the delay of delivery of the "Verified Complaint" from his employee, Ian Yeung, to defendant's counsel, Mr. Levin. Yeung states in her affidavit that she received the Verified Complaint on April 28, 2017, but neglected to deliver it Mr. Levin until June 6, 2017. (Defendant's Notice of Motion, Exhibit B, Affidavit of Ian Yeung.) Defendant claims that the delay in answering "caused no prejudice to plaintiffs" and that public policy favors resolving cases on the merits. (Defendant's Notice of Motion, Affirmation in Support of Motion to Dismiss Complaint, at ¶ 47.)

Plaintiffs note that defendant posted a statement on his Twitter account on April 27, 2017, three days after the commencement of this action, acknowledging that he received the complaint. (Affirmation of Plaintiffs' Counsel, Exhibit 1.) Plaintiffs also note defendant selected Mr. Levin as defendant's counsel in this matter because Yeung states in her affidavit that she was "told on May 15, 2017 that Mr. Levin would be counsel." (Defendant's Notice of Motion,

Exhibit B, Affidavit of Ian Yeung, ¶ 4; Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss, at 7.) Plaintiffs further note that defendant posted on May 18, 2017, a video to YouTube (<https://www.youtube.com/watch?v=B0wRBoeqcCE>), in which defendant was accompanied by Mr. Levin and "Mr. Levin identified himself as '[defendant's] attorney.'" (Affirmation of Plaintiffs' Counsel at ¶ 13.) In addition, plaintiffs note that "defendant is a sophisticated businessman and has, since his arrival in the United States, been a frequent litigant in New York courts". (Affirmation of Plaintiffs' Counsel at ¶ 10.) Plaintiffs list three cases involving defendant or parties related to defendant, and allege that "defendant recently and timely appeared before this court in his personal capacity in Pacific Alliance Asia Opportunity Fund L.P. v. Kwok Ho Wan, Index No. 652077/2017 (represented by Boies Schiller Flexner LLP), which action was commenced on April 18, 2017, three days before this case." (Affirmation of Plaintiffs' Counsel at ¶ 10.) Defendant does not dispute that he had actual knowledge of this action at least since April 27, 2017, that Mr. Levin was his attorney at least since May 18, 2017, and that he is not a first-time litigant in this court.

Under CPLR 3012, upon the application of defendant, the court may extend the time to answer, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

Although defendant did not timely answer, defendant moved to extend his time to answer only 10 days after the due date. Plaintiffs have not demonstrated that they suffered prejudice as a result of the delay, and plaintiffs have not yet moved for a default judgment. Because public policy favors determinations on the merits, defendant's motion to extend his time to serve an answer is granted. (*See Pagan v Four Thirty Realty LLC*, 50 AD3d 265, 266 [1st Dept 2008].) Defendant shall have 45 days from the date of service of a copy of this order with notice of entry to serve and file an answer.

Accordingly, it is

ORDERED defendant's motion to dismiss under CPLR 3211 (a) (3) is denied to the extent that Caixin's legal capacity to sue is subject to its obtaining a certificate under BCL § 1312 (a) within 60 days from the date of service of a copy of this order; and it is further

ORDERED that defendant's motion to dismiss the complaint under CPLR (a) (7) for plaintiffs' failure to state a cause of action for trade libel is granted, with leave for plaintiffs to replead special damages within 10 days from the date of service of a copy of this order; and all other aspects of the motion is otherwise denied and it is further

ORDERED that defendant's motion to extend the time to serve an answer is granted and defendant shall have 45 days from the date of service of a copy of this order with notice of entry to serve and file an answer; and it is further

ORDERED that plaintiffs shall serve a copy of this decision on defendant with notice of entry and on the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

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ORDERED that the parties appear for a preliminary conference on April 25, 2018, at 11:00 a.m. in Part 7, at 60 Centre Street, room 345.

Dated: January 11, 2018

  
J.S.C.

**HON. GERALD LBOVITS**  
**J.S.C.**