

Tilem & Assoc., P.C. v Pastore
2018 NY Slip Op 34246(U)
September 20, 2018
Supreme Court, Westchester County
Docket Number: Index No. 55692/2018
Judge: Mary H. Smith
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

PRESENT:

HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT

TILEM & ASSOCIATES, P.C. and PETER H. TILEM,

Plaintiff(s),

-against-

EUGENE PASTORE and SUSAN CORSI,

Defendant(s).

DECISION & ORDER

Index No.: 55692/2018

Motion Date: 7/27/2018

Defendants *pro se* move (Motion Seq. # 1) for an order, dismissing plaintiffs' action for lack of jurisdiction or, alternatively, dismissing plaintiffs' action for failure to state a cause of action.¹ Plaintiff moves (Motion Seq. #2), by order to show cause, for an order, enjoining defendants, their agents, representatives and employees, or anyone acting at their direction or on their behalf, from publishing or disseminating any false, misleading or injurious statements about plaintiffs during the pendency of this action. Defendants move (Motion Seq. # 3) for an order, dismissing plaintiffs' action for lack of jurisdiction or alternatively, dismissing plaintiffs' action for failure to state a cause of action.

The following papers were read:

Notice of Motion	1
Order to Show Cause, Affirmation, Exhibits (2), and Memo of Law	2-6
Notice of Motion and Affidavit	7-8
Affirmation in Opposition	9

By way of background, plaintiffs commenced this action with a summons with notice. On May 15, 2018, defendants filed a demand for a complaint. On June 4, 2018, plaintiffs filed a verified complaint (Initial Complaint). Subsequently, on June 21, 2018, defendants filed a pre-answer motion to dismiss the Initial Complaint (Motion Seq. # 1).

¹ Though defendants appear in this action *pro se* there is some indication that defendants' papers may have been prepared with the assistance of counsel, the Court notes to the extent *pro se* defendants may be represented by an attorney, that attorney must be barred in New York and maintain a physical office in New York (*see generally Schoenefeld v State of New York*, 25 NY3d 22 [2d Dept 2015]).

On June 22, 2018, plaintiffs filed an amended verified complaint (Complaint), which among other things, alleged defendants published false, misleading, and injurious statements concerning plaintiff Peter H. Tilem and plaintiff Tilem & Associates, P.C. Now, plaintiffs' move for, among other things, an order, enjoining defendants from publishing or disseminating any false, misleading or injurious statements about plaintiffs. Defendants move to dismiss the Complaint. The Court will address each motion in turn.

Regarding Motion Seq. # 1, the Complaint superseded the Initial Complaint.² As such, Motion Seq. # 1 is rendered moot (*see Elegante Leasing, Ltd. V Cross Trans Svc, Inc.*, 11 AD3d 650, 650-651 [2d Dept 2004]). Accordingly, Motion Seq. # 1 is denied. Next the Court addresses plaintiffs' motion for a preliminary injunction.

"Although the purpose of a preliminary injunction is to preserve the status quo pending a trial, the remedy is considered a drastic one, which should be used sparingly. As a general rule, the decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court" (*Trump on the Ocean, LLC v Ash*, 81 AD3d 713, 715 [2d Dept 2011] [internal citation omitted]). In exercising that discretion, the Court must determine if the moving party has established, "by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of the injunction" (*see Yedlin v Lieberman*, 102 AD3d 769, 769 [2d Dept 2013]).

In support of its motion, plaintiffs proffer the affirmation of Peter H. Tilem, Esq. exhibiting the Complaint and statements posted online relating to plaintiffs' practice of law. Mr. Tilem contends that defendants have written seven false, misleading, and injurious reviews, that such conduct is ongoing, and has caused substantial and irreparable harm by resulting in substantial loss of money and lessening of goodwill associated with plaintiffs' legal services. As such, plaintiffs contend they are entitled to a preliminary injunction enjoining defendants and anyone acting at their direction from publishing or disseminating any false, misleading, or injurious statements about plaintiffs. Defendants have not oppose the motion.

Plaintiffs have failed to prove by clear and convincing evidence that they are likely to succeed on the merits of the action. Plaintiffs' proffered evidence is based only upon information and belief that the negative reviews were made by, or under the direction of, defendants. Accordingly, plaintiffs' motion is denied without prejudice. Next the Court address defendants' motion to dismiss the Complaint.

Defendants move to dismiss plaintiffs' action for lack of personal jurisdiction for failure to state a cause of action. In support of their motion, defendants contend, among

² Plaintiffs amended their pleadings pursuant to CPLR 3025 (a), as the time to respond to the complaint had not expired (*see generally Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169, 1170 [2d Dept 2017]).

other things, that defendants' alleged contacts with New York are insufficient to justify exerting jurisdiction under CPLR 302 (a) (1). Defendants argue that as defamation is the basis of plaintiffs' action, there is a higher burden of proof; that is, plaintiffs must demonstrate that defendants conducted purposeful activities in New York and that a substantial nexus exists between those activities and the claim of defamation. Defendants contend that the alleged posting of defamatory statements online is insufficient to constitute a purposeful activity within the state. Defendants further argue that there is not a substantial nexus between any alleged contractual relationship between defendants and plaintiffs and the alleged tort of defamation. Alternatively, defendants argue that the Complaint fails to state a cause of action. Defendants contend that the alleged defamatory statements are not believable and hyperbolic in nature, thus are not actionable under a defamation claim, and fail to satisfy the requisite element of falsity required to plead a claim of defamation.

In opposition, plaintiffs contend that the parties entered an attorney-client relationship in New York, for representation which occurred in New York, and that the attorney-client relationship is continuous in nature, going beyond the conclusion of representation. Plaintiffs further contend that there is a substantial nexus between the attorney-client relationship and defendants' alleged posting of the defamatory statements. Regarding defendants' contention that the Complaint fails to state a cause of action, plaintiffs identify several statements allegedly made by defendants, indicating that the statements are not mere opinion but rather false assertions of fact.

A court may exercise personal jurisdiction over any non-domiciliary who, in person, transacts any business within the state (CPLR 302 [a] [1]). Upon a motion to dismiss for lack of personal jurisdiction, it is the plaintiff who bears the ultimate burden of proof to establish a basis for such jurisdiction (*see America/International 1994 Venture v Mau*, 146 AD3d 40, 51 [2d Dept 2016]). Plaintiff need only make a *prima facie* showing that defendants are subject to the personal jurisdiction of the court (*id.*). When personal jurisdiction is being challenged pursuant to CPLR 302 (a) (1), plaintiffs must demonstrate defendants performed "some purposeful activities within the State that would justify bringing the nondomiciliary defendant before the New York courts" and "there must be some articulable nexus between the business transacted and the cause of action sued upon" (*SPCA of Upstate N.Y., Inc. v American Working Collie Assn.*, 18 NY3d 400, 404 [2012] [internal citation omitted]). When determining whether the necessary nexus exists between defendants' purposeful activities and the transaction giving rise to the defamation cause of action, the court must consider whether the relationship between the activities and the allegedly offending statement is too diluted in either time or content (*id.*).


Here, plaintiffs establish their *prima facie* burden that defendants are subject to personal jurisdiction in New York by proffering the Complaint and affirmation of Peter H. Tilem. Mr. Tilem avers that defendants purposefully entered into a contract in New York for legal representation to take place in New York. The contractual relationship concluded

in May 2017. Subsequently, plaintiffs allege that beginning in March 2018 defendants began posting defamatory statements relating to the legal representation on multiple online platforms. As such, the allegedly offending statements and the purposeful activity of entering into a contract for legal representation are sufficiently related to confer personal jurisdiction over defendants in New York (*cf. America/International 1994 Venture*, 146 AD3d at 52-59). Accordingly, defendants' motion to dismiss pursuant to CPLR 3211 (a) (8) is denied.

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the Court is to afford the pleading a liberal construction (*see* CPLR 3026), accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and simply determine whether the alleged facts fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The Court of Appeals has explained that “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss” (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]; *see also Harris v Barbera*, 96 AD3d 904, 906 [2d Dept 2012]). When a plaintiff asserts a cause of action of defamation, the pleadings must allege sufficient facts to satisfy each element of a defamation claim (*see Kamchi v Weissman*, 125 AD3d 142, 156-159 [2d Dept 2014]). Further, on a motion to dismiss a defamation claim pursuant to CPLR 3211 (a) (7), it is appropriate for the court to inquire into “whether a reasonable listener or reader could have concluded that the statements were conveying facts [rather than] expressions of opinion” (*id.* at 156-157).

Here, giving every possible favorable inference and assuming all the alleged facts as true, plaintiffs have stated a cause of action for defamation. Further, there are portions of the alleged defamatory statements which are factual in nature and not mere expressions of opinions. Accordingly, defendants' motion to dismiss pursuant to CPLR 3211 (a) (7) is denied. To the extent not specifically addressed herein, the Court finds defendants' remaining arguments to be without merit. Pursuant to 22 NYCRR 202.12, parties are directed to request a preliminary conference.

Dated: September 20, 2018
White Plains, New York



HON. MARY H. SMITH
Justice of the Supreme Court