

**Brummer v Wey**

2019 NY Slip Op 32764(U)

September 19, 2019

Supreme Court, New York County

Docket Number: 153583/2015

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

CHRISTOPHER BRUMMER,

Index No. 153583/2015

Plaintiff

- against -

DECISION AND ORDER

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

Defendants

APPEARANCES:

For Plaintiff

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For Defendants Wey and NYG Capital LLC

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff moves to file a second amended complaint to allege that, since the amended complaint in January 2017, defendants Wey and NYG Capital LLC have published 29 defamatory statements about plaintiff and intentionally inflicted emotional distress on him through racist insults and steps to ensure that the defamation and insults emerge at the top of internet searches regarding plaintiff. C.P.L.R. § 3025(b). Plaintiff also seeks to add claims of assault and battery by Wey January 31, 2019.

Leave to amend pleadings is to be freely granted unless it

would surprise or otherwise prejudice the opposing parties.

C.P.L.R. § 3025(b); Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015); Kimso Apts., LLC v. Gandhi, 24 N.Y.3d 403, 411 (2014); Global Liberty Ins. Co. v. Tyrell, 172 A.D.3d 499, 500 (1st Dep't 2019); Y.A. v. Conair Corp., 154 A.D.3d 611, 612 (1st Dep't 2017). The court nevertheless must deny proposed amendments that lack merit: Davis v. South Nassau Communities Hosp., 26 N.Y.3d at 580; Thomas Crimmins Contr. Co. v. City of New York, 74 N.Y.2d 166, 170 (1989); Reyes v. BSP Realty Corp., 171 A.D.3d 504, 504 (1st Dep't 2019); Y.A. v. Conair Corp., 154 A.D.3d at 612.

## II. THE NEW CLAIMS THAT LACK MERIT

Any newly alleged defamation or intentional infliction of emotional distress that occurred before July 24, 2018, more than a year before plaintiff filed this motion, is barred by the applicable one year statute of limitations. C.P.L.R. § 215(3); Offor v. Mercy Med. Ctr., 171 A.D.3d 502, 502-503 (1st Dep't 2019); Biro v. Conde Nast, 171 A.D.3d 463, 464 (1st Dep't 2019); Torati v. Hodak, 147 A.D.3d 502, 503 (1st Dep't 2017); Bridgers v. Wagner, 80 A.D.3d 528, 528 (1st Dep't 2011). Therefore these proposed amendments lack merit as a matter of law. Davis v. South Nassau Communities Hosp., 26 N.Y.3d at 580-81; Thomas Crimmins Contr. Co. v. City of New York, 74 N.Y.2d at 173; Reyes v. BSP Realty Corp., 171 A.D.3d at 504; Y.A. v. Conair Corp., 154 A.D.3d at 612. See LDIR, LLC v. DB Structured Prods., Inc., 172 A.D.3d 1, 4 (1st Dep't 2019).

Plaintiff's claims in the proposed second amended complaint may be treated as interposed at the time of the prior pleading, as long as it gave notice of the transactions or occurrences underlying the new claims, and defendants will not be unduly prejudiced by the amendments. C.P.L.R. § 203(f)); U.S. Bank N.A. v. DLJ Mtge. Capital, Inc., 33 N.Y.3d 84, 90 (2019); Buran v. Coupal, 87 N.Y.2d 173, 178 (1995); Ramirez v. Elias-Tejada, 168 A.D.3d 401, 402 (1st Dep't 2019); O'Halloran v. Metropolitan Transp. Auth., 154 A.D.3d 83, 86 (1st Dep't 2017). The discrete instances of defamation and intentional infliction of emotional distress between the amended complaint filed January 13, 2017, and this motion filed July 24, 2018, do not relate back to the amended complaint, however, as plaintiff does not even attempt to show how the amended complaint gave defendants notice of these subsequent separate occurrences. Torati v. Hodak, 147 A.D.3d at 503; Casa de Meadows Inc. (Cayman Is.) V. Zaman, 76 A.D.3d 917, 920 (1st Dep't 2010). The amended complaint does not allege any facts regarding them, nor are they still within the limitations period. Therefore plaintiff's claims of defamation and intentional infliction of emotional distress based on occurrences before July 24, 2018, do not relate back to the amended complaint's filing date and are barred by the statute of limitations. C.P.L.R. § 215(3); Bossung v. Rebaco Realty Holding Co., N.V., 169 A.D.3d 538, 538 (1st Dep't 2019); Torati v. Hodak, 147 A.D.3d at 503; Casa de Meadows Inc. (Cayman Is.) V. Zaman, 76 A.D.3d at 920. See U.S. Bank N.A. v. DLJ Mtge. Capital, Inc., 33

N.Y.3d at 90; Buran v. Coupal, 87 N.Y.2d at 178.

While the proposed second amended complaint includes new allegations of defamatory statements that occurred on dates on dates both before and after July 24, 2018, the new pleading also includes allegations of defamation that do not specify when defendants published the statements. These defamation claims fail to meet C.P.L.R. § 3016(a)'s pleading standards, requiring the time of the defamatory statement to be specified. Offor v. Mercy Med. Ctr., 171 A.D.3d at 503; Knopf v. Sanford, 123 A.D.3d 521, 522 (1st Dep't 2014); Romanello v. Intessa Sanpaolo, S.p.A., 97 A.D.3d 449, 455 (1st Dep't 2012), aff'd, 22 N.Y.3d 881 (2013); Khan v. Duane Reade, 7 A.D.3d 311, 312 (1st Dep't 2004).

Therefore the court denies plaintiff permission to amend the amended complaint to include the proposed second amended complaint's claims of defamation and intentional infliction of emotional distress that predate July 24, 2018, and claims of defamation that are undated because both those categories of amendments lack merit. Davis v. South Nassau Communities Hosp., 26 N.Y.3d at 580-81; Thomas Crimmins Contr. Co. v. City of New York, 74 N.Y.2d at 173; Reyes v. BSP Realty Corp., 171 A.D.3d at 504; Y.A. v. Conair Corp., 154 A.D.3d at 612.

### III. THE NEW CLAIMS' EFFECT ON THIS ACTION

The recent alleged defamatory, insulting, and harassing communications, insofar as they are timely and adequately specific, not only involve the same parties, but also were published on the same websites as the defamatory statements

alleged in the amended complaint, which plaintiff insists defendants control. Defendants have steadfastly maintained that they no longer controlled the alleged defamatory websites at any time when the websites published the statements alleged in the amended complaint or since. Therefore the recent alleged defamation and distressing communications likely will involve the same central issue of defendants' connection to the defamatory websites and the same defense and pose minimal hindrance to defendants in their preparation for trial.

Although defendants maintain that plaintiff has delayed in amending the complaint, they do not claim that the delay has prejudiced them by impeding their ability to locate necessary witnesses or other evidence. Defendants must demonstrate actual prejudice to warrant the denial of permission to amend the amended complaint; their speculation as to potential prejudice is insufficient. Eshaghian v. Eshaghian, 170 A.D.3d 416, 416 (1st Dep't 2019); Flowers v. 73rd Townhouse LLC, 149 A.D.3d 420, 421 (1st Dep't 2017); Spitzer v. Schussel, 48 A.D.3d 233, 234 (1st Dep't 2008). The only new allegations that plaintiffs will add stem from conduct in 2018 and 2019, mitigating any concerns about stale evidence. While defendants undoubtedly will seek extended disclosure to explore the details of the newly alleged communications, plaintiff promises that he needs no further disclosure to pursue his new claims, reducing the delay that the amendments inevitably will occasion.

Although the allegations of assault and battery are timely,

they do not support or enhance the amended complaint's claims, which are limited to defamation and intentional infliction of emotional distress. Plaintiff's assault and battery claims do not restate or extrapolate on allegations in the prior complaint or simply add new theories of recovery arising from occurrences already alleged. Instead, the amendments allege new occurrences never before pleaded, requiring defendants to investigate and gather evidence unrelated to any of the prior claims.

Sidetracking this action and delaying it further with these extraneous discrete claims serve no purpose when plaintiff may institute these timely claims in a separate action.

#### IV. CONCLUSION

For all the reasons explained above, the court denies plaintiff's motion to amend the amended complaint to include the proposed second amended complaint's claims of defamation and intentional infliction of emotional distress that predate July 24, 2018; claims of defamation that are undated; and claims of assault and battery. C.P.L.R. §§ 215(3), 3025(b). The court grants plaintiff's motion to amend the amended complaint to include the proposed second amended complaint's claims of defamation and intentional infliction of emotional distress that postdate July 24, 2018. C.P.L.R. § 3025(b). Pursuant to the schedule set forth on the record September 12, 2019, plaintiff shall file any second amended complaint consistent with this order by September 25, 2019. Consistent with plaintiff's promise to refrain from further disclosure, and pursuant to the schedule,

defendants shall serve any further disclosure demands, which shall be limited to the new claims in the second amended complaint, by October 9, 2019, and shall conduct any further depositions sought by these demands by November 8, 2019. The court extends the deadline for plaintiff to file a note of issue from October 29 to November 13, 2019, to accommodate defendants' further disclosure demands.

DATED: September 19, 2019



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LUCY BILLINGS, J.S.C.

**LUCY BILLINGS**  
J.S.C.