

**Aponsah v McTee**

2019 NY Slip Op 35120(U)

June 14, 2019

Supreme Court, Bronx County

Docket Number: Index No. 36150/2017E

Judge: Llinét M. Rosado

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This opinion is uncorrected and not selected for official publication.

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

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LADYPEARL APONSAH and AISHA LLEWELLYN,

Plaintiffs

-against-

SHELLY MCTEE and ELLEN CROWLEY,

Defendants.

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DECISION AND ORDER

Index No.: 36150/2017E

Plaintiffs commenced this action for defamation and malicious prosecution against defendants Shelly McTee (McTee) and Ellen Crowley (Crowley) by the filing of a Summons and Complaint on December 19, 2017. Plaintiffs now move for an order extending their time to serve defendant McTee, nunc pro tunc, and permitting an expedient method of service. Defendant McTee moves by notice of cross motion for an order dismissing plaintiffs' amended complaint for failure to state a cause of action, lack of jurisdiction, and untimely commencement of the action.

Plaintiffs were employed by Alvita Home Care, and were assigned as home care attendants for co-defendant Crowley and her spouse Robert Wheeler (Wheeler). Crowley and Wheeler were residents of New York. In 2016, McTee, an out of state resident, came to New York to manage the couple's finances.

On or about November 9, 2016, defendants filed a report with the New York City Police Department (NYPD). McTee reported that the plaintiffs attempted to cash checks belonging to the co-defendant, but that McTee stopped payment. On or about December 20, 2016, plaintiffs were arrested and charged with grand larceny and endangering the welfare of an incompetent person. On September 19, 2017, the charges against plaintiffs were dismissed.

On a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. (see CPLR 3026). We accept the facts as alleged in the complaint as true, accord the plaintiffs the benefit of every possible inference and determine only whether the facts alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83 (1994).

Defendant's motion to dismiss plaintiffs' claims for defamation for failure to state a cause of action is denied. McTee contends that the claim for defamation must be dismissed because the amended complaint fails to set forth the specific statements made by McTee. The complaint alleges that defendant made false and defamatory statements to Detective Delwyn Davis, of the New York City Police Department, that plaintiffs wrote checks without authorization or permission, the amounts of the checks, and the dates the statements were made. The complaint sufficiently sets forth the words upon which the defamation claim is based. *Leon v Martinez, id.*

Defendant's motion for an order dismissing the claim for malicious prosecution for failure to state a cause of action is denied. To prevail on a claim for malicious prosecution, plaintiff is required to prove four elements: defendant's initiation of a criminal proceeding against them; termination of the proceeding in their favor; lack of probable cause and malice.

“Failure to establish any one of these elements defeats the entire claim.” *Brown v Sears Roebuck and Co.*, 297 AD2d 205 (1<sup>st</sup> Dept. 2002). However, on a motion to dismiss for failure to state a cause of action, plaintiff is not required to submit evidentiary proof of malice or to rebut a defendant’s claim of qualified privilege. (see *Sokol v Leader*, 74 AD3d 1180 (2<sup>nd</sup> Dept. 2010); *Pezham v City of New York*, 29 AD3d 164 (1<sup>st</sup> Dept. 2006). Furthermore, plaintiffs have sufficiently alleged that the criminal proceeding was terminated in their favor. *Leon v Martinez*, *supra*; see also *Smith-Hunter v Harvey*, 95 NY2d 191 (2000).

Defendant’s motion to dismiss the first and third causes of action for lack of jurisdiction is denied. Although McTee argues that the court lacks jurisdiction over claims against her as a non domiciliary as to a cause of action for defamation, defamation claims may proceed against non-domiciliaries who transact business in New York and thereby satisfy the requirements of CPLR 302(a)(1). “The ability of a plaintiff to obtain long arm jurisdiction pursuant to CPLR 302(a)(1) for a defamation claim depends both on the sufficiency of the defendant’s New York transactional activity and on the strength of the nexus between that activity and the defamatory act.” *SPCA v American Working Collie Assn.*, 18 NY3d 400 (2012). McTee’s appearance in New York to manage Crowley and Wheeler’s finances was sufficiently purposeful activity to confer jurisdiction. *Al Rushaid v Pictet & Cie*, 28 NY3d 316 (2016); *San Ysidro Corp. v Robinow*, 1 AD3d 185 (1<sup>st</sup> Dept. 2003).

Pursuant to CPLR 215(3) an action for defamation must be commenced within one year from the date the defamatory statement is published. The plaintiffs rely on the statement by Detective Delwyn Davis, dated December 20, 2016, that he was informed by defendants that two personal checks were drawn from Crowley and Wheeler’s joint bank account, which were not approved, both of which were endorsed by Ladypearl Aponsah. These allegations were the basis for the felony charges against Aponsah. Since plaintiffs’ summons and complaint was filed within a year of the date the defamatory statement was published, plaintiffs’ cause of action is not time barred.

Plaintiffs have demonstrated a potentially meritorious cause of action against McTee. In addition, plaintiffs have documented due diligence of seven unsuccessful attempts to serve McTee in Arizona. Plaintiffs’ motion to extend the time within which plaintiffs must serve McTee is granted in the interest of justice. CPLR 306-b.

Plaintiffs’ motion for an order directing an alternative method of service is denied. A person subject to the jurisdiction of the courts of the state may be served with the summons without the state, in the same manner as service is made within the state. CPLR 313. Plaintiffs have failed to establish that the prescribed methods for the service of process is impracticable.

Accordingly, it is hereby

ORDERED, defendant’s motion to dismiss the causes of action for defamation as set forth in the amended complaint pursuant to CPLR 3211(a)(8) because the court lacks personal jurisdiction is denied; and it is further

ORDERED, defendant’s motion to dismiss the causes of action for defamation pursuant to CPLR 3211 (a)(5) because the applicable statute of limitations has expired is denied; and it is further

ORDERED, defendant’s motion to dismiss the causes of action for defamation as set forth in the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action is denied; and it is further

ORDERED, defendant’s motion to dismiss the causes of action for malicious

prosecution as set forth in the amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action is denied ; and it is further

ORDERED, defendant's motion to dismiss for plaintiffs' failure to serve a summons and complaint pursuant to CPLR 306-b and CPLR 3211(a)(8) is denied; and it is further

ORDERED, plaintiffs' motion for an order extending the time of the plaintiff to make service upon defendant Shelly McTee is granted to the extent that plaintiffs will have 120 days from the date of service of the instant order with notice of entry to effectuate service of the amended summons and complaint upon the defendant; and it is further

ORDERED, plaintiffs' motion for an order directing an alternative method of service is denied; and it is further

ORDERED, plaintiff shall serve a copy of this order with notice of entry upon the defendant within thirty (30) days of the date of entry of this order.

This constitutes the decision and order of the court.

Dated: June 14, 2019



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LLINET M. ROSADO, J.S.C.

HON. LLINET ROSADO