SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C. PART 8

MANUELE VERDI

INDEX NO. 158747/16

MOT. DATE

- v -

JEFFREY DINOWITZ

MOT. SEQ. NO. 012, 013 and 014

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).____

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).____

Replying Affidavits NYSCEF DOC No(s).____

There are three motions pending in this action which are the subject of this decision/order. In motion sequence 012, defendant moves to "prevent[] all depositions in this matter from proceeding", "limiting all future depositions ... only to the witness' personal knowledge of the facts relevant to [plaintiff's] defamation claims' preventing plaintiff's counsel from acting as counsel fo record at all further depositions, preventing plaintiff from attending all further depositions or alternatively ordering him not to speak on the record. Alternatively, defendant seeks the appointment of a referee to supervise depositions at plaintiff's cost.

In sequence 013, plaintiff moves by order to show cause for an order vacating any stay of depositions or discovery, staying Justin Brannan's deposition, the appointment of a referee "to supervise and oversee litigation in the matter", sanctions against defendant's counsel and attorneys fees/costs. In said OSC, the court stayed discovery and depositions pending the determination of the motion.

Finally, in motion sequence 014, defendant moves to dismiss [1] plaintiff's second cause of action for defamation, libel and slander in its entirety as time-barred, pursuant to CPLR 3211(a)(5); [2] Paragraph 104 (part of Plaintiff's Third Cause of Action for defamation, libel and slander) as time-barred, pursuant to CPLR 3211(a)(5); [3] Paragraph 108 (part of Plaintiff's Third Cause of Action for defamation, libel and slander) and Paragraph 123 (part of Plaintiff's Fourth Cause of Action for defamation, libel and slander) as prohibited by the law of the case doctrine and the principle of res judicata, pursuant to CPLR 3211(a)(5); and [4] plaintiff's demands for punitive damages. Plaintiff cross-moves for sanctions.

The court will first consider the motion to dismiss. On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d633 [1976]). The adverse party on each motion/cross-motion has submitted opposition.

Dated: 3-5-20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐ **GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

This case was commenced on October 18, 2016. A cause of action for defamation is subject to a one-year statute of limitations. Plaintiff's second cause of action arises from "specific additional inflammatory statements made by [defendant] to a New York Post reporter for publication that appeared on October 25, 2015 entitled "Desk Dumping Principal in hot water for overcrowding school". Similarly, paragraph 104 amplifies plaintiff's third cause of action by asserting a separate claim arising from another newly asserted article in the Riverdale Review publication dated November 12-18, 2015. As defendant correctly argues, these are new statements in entirely new publications that were not preiouvsly asserted in plaintiff's prior pleadings. These statements cannot reasonably be viewed as relating back to prior timely-alleged statements made by defendant. It is of no moment that plaintiff allegedly learned of the claims during the course of discovery in this case. For all these reasons, the court finds that the aforementioned claims are time-barred. Accordingly, the second cause of action and paragraph 104 of the third cause of action are severed and dismissed.

The balance of the motion to dismiss is also granted. The court agrees with defendants that Justice Bluth had previously struck plaintiff's claims arising from the allegations asserted in paragraphs 108 and 123. Finally, plaintiff has failed to allege that defendant was solely motivated by a desire to injure plaintiff when he made the allegedly defamatory statements which is fatal to a claim for punitive damages. Accordingly, the motion to dismiss is granted in its entirety. In light of the result, the court denies plaintiff's cross-motion for sanctions.

The court next turns to the discovery motions. This court will not simply appoint a Special Referee to supervise discovery where a reminder to counsel of their professional obligations to conduct themselves civilly and professionally in all aspects of this litigation, including depositions, would suffice. However, such a simple reminder is not sufficient on this record.

For example, when counsel extends a courtesy to an adversary by adjourning a deposition due to a medical emergency, that courtesy should not then be used by plaintiff's counsel against the defendant to skip over the adjourned deposition and move forward with a new witness contrary to the parties' agreement and customary practice.

Further, the court finds that plaintiff's counsel has demonstrated an appalling lack of civility in this litigation. Use of colorful language to describe defense counsel such as "smarmy" is wholly inappropriate. This is a judicial proceeding, not a schoolyard playground. Plaintiff's counsel's refusal to allow depositions witnesses to finish answering questions and the argumentative nature of his questioning in general all serve as evidence of counsel's lack of professionalism.

During plaintiff's counsel's questioning of Laura Moukas, a non-party, Attorney Glaser asked the witness "[h]ow many times have you spoken to Randi Martos, since you received the Subpoena?" Ms. Moukas answered

> A. We speak for other reasons than the subpoena. So I don't know. We became friends because of this lawsuit, so thank you.
>
> Q. You're welcome.
>
> A. Yeah, thank you.
>
> Q. I'm glad you're finding your way around with politicians now. So you're welcome.
>
> A. I'm not sure what that means.

Ms. Moukas transcript is filled with pages and pages of argument back-and-forth between the attorneys.

As another example, during the conduct of Mr. Shelton's deposition, an excerpt of the transcript provided to the court reads:

Q Yes. So let me back up a second.
Was there a time period, recently, where P.S. 24 was without a permanent principal?

A Yes.

Q And do you know if Mr. Verdi at all had any role in that?

MR. GLASER: Objection.

A I know that there were –

MR. GLASER: Mr. Shelton, let me pose my objection, and –

MR. MOERDLER: No speaking objections.

MS. TAKEFMAN: No, there's no speaking objection.

MR. VERDI: Shut up?

MS. TAKEFMAN: There's no speaking objections.

MR. VERDI: You don't have to talk either.

MR. GLASER: I will make an objection.

MR. VERDI: You don't have to talk. Shut up?

MR. GLASER: I think that Mr. Moerdler should actually adhere to the rules of conduct for depositions and not talk during this deposition. I know he's resisted that over and over again, but he should actually follow the rules.

MR. BERTACCINI: You might want to instruct your client not to speak.

MR. GLASER: You know what

MR. BERTACCINI: He's not a counselor of the law.

MR. GLASER: I just want it understood –

MR. BERTACCINI: He's not allowed to speak.

MR. GLASER: Mr. Bertaccini –

MR. BERTACCINI: He's allowed to be here, but he's not allowed to speak.

MR. GLASER: Mr. Bertaccini, neither is Mr. Moerdler, or you for that matter.

MR. BERTACCINI: As counsel of record, we are.

MR. GLASER: Neither is Mr. Moerdler, or you, and I just want it understood, I have counseled my client not to speak during depositions. I've also counseled

> second attorneys that are not authorized to speak at this deposition, from interposing objections and making speaking objections over and over again. You have not abided by the rules , and I've told my client to abide by the rules. So you keep on not abiding. by the rules, I can't keep on instructing my client to do something that you have turned into a circus, Mr. Bertaccini. Now, for the record, Ms. Takefman in attempting to lead -- in attempting to lead this witness, is trying to say Mr. Verdi 1 did something to prevent the permanent principal from taking his position. The bottom line remains, whatever complaints he had, it's the process that prevented that principal from going forward. I know this is a fundamentally false position that Mr. Dinowitz has been spreading in his lawsuit, and even Mr. Moerdler has been spreading publicly. But the point is you can't attempt to lead this witness on the issue of what Mr. Verdi was preventing when it was actual school policy. So I think you should rephrase the question with regard to actual school policy.
>
> MS. TAKEFMAN: Please note that that was an improper speaking objection. And I ask that you please read back the question.

This portion of the transcript is particularly illuminating. Not only does plaintiff's counsel acknowledge that speaking objections are improper, he goes on to give a lengthy one and further admits that he has advised his client not to speak during depositions to no avail. Indeed, plaintiff's counsel concedes that "I can't keep on instructing my client to do something..."

22 NYCRR 130-1.1 [c] defines conduct as frivolous if: [1] it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; [2] it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or [3] it asserts material factual statements that are false.

Plaintiff and his counsel's conduct is the type of conduct which Part 130 was designed to discourage. On this record, the court finds that both plaintiff and his counsel have engaged in frivolous conduct within the meaning of the court rules. Accordingly, both plaintiff and his counsel are sanctioned $500 each for their frivolous conduct.

The record is clear that not only the parties, but the attorneys, do not get along amicably. The nature and extent of their disputes is informed by the number of motions that have already been made in this case relating to discovery and the fact that discovery remains outstanding after three and a half years of litigation. Therefore, the court will refer this action to a Special Referee to supervise discovery (*see i.e. Lowitt v. Burton I. Korelitz, M.D., P.C.*, 152 AD2d 506 [1st Dept 1989]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion to dismiss (sequence 014) is granted to the extent that Accordingly, the second cause of action and paragraphs 104, 108 and 123 of the third cause of action are severed and dismissed; and it is further

ORDERED that plaintiff's cross-motion is denied (014); and it is further

ORDERED that motion sequence numbers 012 and 013 are granted to the extent provided herein; and it is further

ORDERED that plaintiff shall serve a copy of this decision/order on the Office of the Special Referee within the next 30 days so that a JHO or special referee can be assigned to supervise discovery and depositions; and it is further

ORDERED that plaintiff and his counsel Attorney Glaser are each sanctioned $500 for frivolous conduct and shall pay such funds pursuant to Section 130-1.3 of the Rules of the Chief Administrative Judge.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated: 3-5-20
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.