

Gwinn v Dellipiane

2020 NY Slip Op 32721(U)

August 20, 2020

Supreme Court, New York County

Docket Number: 156222/2019

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

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INDEX NO. 156222/2019

LOVELYNN GWINN,

MOTION SEQ. NO. 001

Plaintiff,

- v -

TATIANA DELLIPIANE, JULIA SDRIGOTTI, REGINA THOMASHAUER, and RELATIONSHIP TECHNOLOGIES LLC D/B/A MAMA GENA'S SCHOOL OF WOMANLY ARTS,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for DISMISSAL.

In this action sounding in defamation, defendant Tatiana Dellipiane ("Dellipiane") moves, pursuant to CPLR 3211(a)(7), CPLR3211(a)(8) and CPLR 306-b, for dismissal of the complaint based on lack of personal jurisdiction and failure to state a cause of action (Docs. 2-5). Plaintiff Lovelynn Gwinn ("Gwinn") opposes Dellipiane's motion and cross moves, pursuant to CPLR 306-b, for an order deeming service of the summons and complaint timely, nunc pro tunc or, in the alternative, extending her time to serve the summons and complaint (Docs. 10-18). Additionally, Gwinn moves, pursuant to CPLR 3025(b), for leave to amend the summons and complaint (Docs. 10-18). Defendants Regena Thomashauer s/h/a Regina Thomashauer ("Thomashauer") and Relationship Technologies LLC d/b/a Mama Gena's School of Womanly Arts ("Mama Gena") (collectively "the Mama Gena defendants") oppose Gwinn's cross motion and also cross move, pursuant to CPLR 3211(a)(5), CPLR 3211(a)(7), CPLR 3211(a)(8) and CPLR 306-b, for dismissal

of the summons and complaint (Docs. 22-33). Gwinn opposes the same (Docs. 38-39). After a review of the parties' contentions, as well as the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On June 23, 2019, Gwinn filed a summons and complaint as a *pro se* against defendants Dellipiane, Julia Sdrigotti ("Sdrigotti"), Mama Gena and its CEO, Thomashauer, based on allegations that, *inter alia*, defamatory statements were made on the internet in June and July 2018 accusing Gwinn of reporting families to Immigration and Customs Enforcement ("ICE") (Doc. 1).

In November 2019, in lieu of an answer, Dellipiane filed the instant motion to dismiss based on lack of personal jurisdiction due to Gwinn's failure to properly serve her with the summons and complaint within 120 days after commencing the action, as required by CPLR 306-b (Doc. 3 ¶ 12-15). Dellipiane further asserts that the complaint warrants dismissal pursuant to CPLR 3211(a)(7) because Gwinn's defamation claim fails to comply with the strict requirements set forth in CPLR 3016(a) (Doc. 3 ¶ 16-21); and that Gwinn fails to plead the requisite elements for tortious interference with business relations, which is otherwise duplicative of the defamation claim (Doc. 3 ¶ 22-34).

The return date on Dellipiane's motion to dismiss was December 9, 2019 and, pursuant to the notice of motion, Gwinn was directed to serve her reply papers at least 7 days before said date (Doc. 2). On December 9, 2019, counsel for Gwinn filed a notice of appearance with this Court and, on that same day, filed a document styled "stipulation" adjourning the motion until January 10, 2020 and setting a new date for Gwinn's papers in opposition to the motion (Doc. 7). However,

the "stipulation" was signed only by Gwinn's attorney and, in an attorney affirmation filed with this Court, Dellipiane opposed Gwinn's request to adjourn the return date (Doc. 8).

On January 3, 2020, Gwinn, represented by counsel, opposed Dellipiane's motion to dismiss and cross moved for, *inter alia*, leave to amend the summons and complaint and an extension of time to serve the same (Docs. 7, 9). Gwinn argues, *inter alia*, that she has established "good cause" for an extension of service because, even as a *pro se* litigant, she exercised reasonable diligence in perfecting service of process upon all defendants and that an extension of time to serve defendants with the summons and complaint is nevertheless warranted under the more expansive "interest of justice" standard (Doc. 11 ¶ 26-36).

Gwinn also argues, *inter alia*, that the amended pleadings will provide further clarification of the claims in the *pro se* complaint, reducing unnecessary motion practice and that, since defendants have not yet interposed an answer in this action, no prejudice will result from the amendment at this stage in the litigation (Doc. 11 ¶ 37-40). Additionally, the amended complaint, claims Gwinn, would render moot Dellipiane's arguments with respect to the sufficiency of the original complaint (Doc. 11 ¶ 42). In effect, she requests that this Court issue an order directing service of the amended summons and complaint within 120 days (Doc. 11 ¶ 40).

In her proposed amended complaint, Gwinn asserts claims against defendants based on libel per quod and libel per se (first and second causes of action); injurious falsehood (third cause of action); intentional infliction of emotional distress (fourth cause of action); tortious interference with business relations (fifth cause of action); and breach of contract as against defendant Mama Gena (sixth cause of action) (Doc. 14 ¶ 56-100).

As alleged in the proposed amended complaint, Gwinn, a licensed real estate broker, purchased a course from Mama Gena entitled "Mastery," which offered networking and business

empowering opportunities for women, to build her clientele and grow her professional business network (Doc 14 ¶ 15-16). The graduates from the Mastery course had a lifetime membership in Mama Gena and access to the private Mastery Graduates Facebook page (Doc. 14 ¶ 13).

Gwinn was also involved in other social media groups relating to her neighborhood in Hamilton Heights, including the Hamilton Heights Facebook page (Doc. 14 ¶ 18).

On June 30, 2018, Dellipiane, who was not a member of Mama Gena, allegedly posted several defamatory statements on the Hamilton Heights community group's Facebook page, including the following statement:

"[a] white woman has reported a few families to ICE in Hamilton Heights aka Harlem. They came and picked them up (3 neighbors) and the neighborhood is devastated and organizing meetups to warn and protect the community. Harlem is primarily Black and Dominican and its obviously being gentrified and it's fucked up that this WW is helping separate families. She's violent. She's inside the Hamilton Heights page here and she don't give a fuck. She's horrible racist things. Her name is Lovelynn Gwinn. Update: I looked her up and I have 64 mutual friends with her. People from Tantra, Mama Gena and Om community. *note-this is real. This is my neighborhood. These people lived a few blocks from me." (Doc. 14 ¶ 18 [a]).

On July 1, 2018, Dellipiane allegedly uploaded a picture of Gwinn to the Hamilton Heights Facebook page; notified the page's members of Gwinn's address; uploaded "evidence" which purported to support her claim that Gwinn called ICE on families and, despite knowing that Gwinn had denied such allegation, continued to perpetuate the claims and "encouraged people to shame, harass and defame" Gwinn (Doc. 14 ¶ 19, 22, 24-25). These statements were a catalyst for discussions on the social media platform between multiple clients and potential clients of Gwinn, as well as members of her community, neighbors and friends (Doc. 14 ¶ 26), which Gwinn alleges Dellipiane affirmatively adopted (Doc. 14 ¶ 28).

As a result of Dellipiane's statements, Gwinn allegedly lost current and prospective clients, and she was excluded from business networking opportunities and business networking platforms

(Doc. 14 ¶ 27). Additionally, Gwinn's tenant notified her that he was moving out of her apartment because he did not feel comfortable living in a building owned by someone who calls ICE on families and that, subsequent to this, she has had difficulty finding suitable tenants for her buildings (Doc. 14 ¶ 27). Dead rats were also placed on the building's doorsteps (Doc. 14 ¶ 27).

On July 1, 2018, Sdrigotti allegedly reposted Dellipiane's June 30, 2018 post on Mama Gena's Mastery Graduates' Facebook page and stated, in relevant part:

"I can't know for 100% sure if this is true however a woman I trust & respect, whom many of us know, Tatiana Dellipiane, just shared information that a Sister Goddess called ICE on a family to have them deported. A family of 3, in Washington Heights. I swamp [sic] I am livid. Her name is Lovelynn Gwinn. I blocked her for Trump trolling me but this is a devastating action she took. I want the community to be aware. This is real life. We must take a stand against this insanity as white Sister Goddesses." (Doc. 14 ¶ 29).

She further posted:

"I stand by posting this and outing her name to our community. My main goal was making the community and [Mama Gena's headquarters] aware. That is done now. . . [w]e cannot create change by staying silent and hiding the names of people in our communities hurting families..." (Doc. 14 ¶ 31).

Although Gwinn denied the allegations, Sdrigotti allegedly continued to disseminate the false information, and Gwinn was unilaterally removed from the group and unfriended by most of its members (Doc. 14 ¶ 33, 36-37). Gwinn emailed Mama Gena to ask why she was not able to access the Mastery Graduates Facebook page but failed to get a timely response (Doc. 14 ¶ 38-41). Instead, the Mama Gena defendants allegedly allowed the comments to build on the page, without giving Gwinn the opportunity to respond to statements made by its members, including comments such as:

"[i]f a whole bunch of SGs want to go to her house and slowly torture her and set her house on fire, regardless of their behavior, they, too, get to stay on the boards as graduates" (Doc. 14 ¶ 43).

The Mama Gena defendants allegedly failed to remove the posts and, instead, on July 2, 2020, Thomashauer posted:

"[w]e will be taking this post down in two hours . . . take an opportunity to learn . . . about different perspectives" (Doc. 14 ¶ 52).

Gwinn claims that, by their actions, the Mama Gena defendants affirmatively adopted the statements posted on the Mama Gena's Facebook page, relegating her to public ridicule, emotional distress and damages, including financial loss (Doc. 14 ¶ 54-55).

In opposition to Gwinn's cross motion to amend, the Mama Gena defendants argue, in relevant part, that the motion should be denied because they will be prejudiced if they are forced to defend in an action for which the statute of limitation for defamation has expired; that the amended complaint was not pleaded with particularity; and that they contend that Gwinn has failed to state a cause of action for all claims asserted in the amended complaint (Doc. 23 ¶ 74-90). In opposition to Gwinn's cross motion, Dellipiane adopts the arguments raised in the Mama Gena defendants' opposition papers (Doc. 40 ¶ 26-27).

LEGAL CONCLUSIONS:

As an initial matter, this Court will, in an exercise of its discretion, consider Gwinn's late opposition papers in deciding the motion since "there is no showing of prejudice, and [Dellipiane] was able to submit reply papers on the motion" (*Serradilla v Lords Corp.*, 117 AD3d 648, 649 [1st Dept 2014]; see *Kavakis v Total Care Sys.*, 209 AD2d 480, 480 [2d Dept 1994]; *UAP N. Am. Ltd. v Soho Props. Inc.*, 2019 NY Slip Op 31168[U], 2019 NY Misc LEXIS 2116, *15 [Sup Ct, NY County 2019]).

1.) Gwinn's Cross Motion to Amend the Complaint

"Th[is] [C]ourt will consider the cross-motion to amend first, because, if granted, the amended complaint will become the operative pleading in this action and will moot the motion to dismiss the original complaint" (*Bd. of Mgrs. of Dragon Estates Condominium v Natoli*, 2018 NY Slip Op 30286[U], 2018 NY Misc LEXIS 569, *7 [Sup Ct, NY County 2018]; see *Gay v Farella*, 5 AD3d 540, 541 [2d Dept 2004]; *Zulauf v St. John's Church*, 2013 NY Slip Op 33187[U], 2013 NY Misc LEXIS 5972, *2 [Sup Ct, NY County 2013]).

It is well-settled that leave to amend a pleading shall be freely given absent prejudice or surprise from the delay (see CPLR 3025[b]; *Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012]). Plaintiff need not establish the merit of his or her proposed new allegations but is required to show that "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). After reviewing the specific contentions raised in the opposition papers to Gwinn's cross motion for leave to amend the complaint, this Court rejects defendants' arguments that Gwinn's claims are plainly lacking in merit or palpably insufficient. Nor have defendants established that the delay in seeking leave to amend the summons and complaint resulted in surprise or prejudice.

Although not raised by the parties, this Court notes that Gwinn attaches a copy of the amended complaint to her cross motion but fails to submit a copy of the amended summons, as CPLR 3025(b) requires (Doc. 14). However, given the limited changes to the summons itself, "failure to strictly comply with the terms of CPLR 3025 (b) is not a fatal defect" (*Boltin v Bd. of Mgrs. of the 447-453 W. 18th St. Condominium*, 2020 NY Slip Op 30317[U], 2020 NY Misc LEXIS 493, *2 n 1 [Sup Ct, NY County 2020]). Moreover, although Gwinn's cross motion also seeks affirmative relief as against the nonmoving defendants, "courts 'retain discretion to entertain

requests for affirmative relief that do not meet the requirements of CPLR 2215" (*Smulczeski v Smulczeski*, 128 AD3d 671, 672 [2d Dept 2015], quoting *Fried v Jacob Holding, Inc.*, 100 AD3d 56, 65 [2d Dept 2013]). Thus, to prevent unnecessary motion practice and in the interest of judicial economy, that branch of Gwinn's cross motion seeking leave to amend the summons and complaint and, as discussed below, an extension of time to serve the same, is granted as against all defendants.

In light of the foregoing, that branch of Dellipiane's motion seeking dismissal of the original complaint, pursuant to CPLR 3211(a)(7), based on alleged deficiencies in the original complaint is rendered moot by the amended complaint (*see Zulauf v St. John's Church*, 2013 NY Misc LEXIS 5972 at *4).

2.) Gwinn's Cross-Motion to Extend Time for Service of the Amended Summons and Complaint.

It is well-established that service of the summons and complaint "shall be made within one hundred twenty days after the commencement of the action" (CPLR 306-b). If plaintiff fails to comply with this requirement, "the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service" (*id.*; *see Yaba v City of NY*, 2020 NY Slip Op 30307[U], 2020 NY Misc LEXIS 507, *2 [Sup Ct, NY County 2020]).

"A good cause extension requires a showing of reasonable diligence in attempting to effect service upon a defendant" (*Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012] [internal quotation marks omitted]). However, the interest of justice standard is more forgiving, allowing courts to accommodate late service that might be attributed to mistake, confusion or oversight, so long as it does not prejudice defendants (*see Leader v Maroney*, 97 NY2d 95, 104-105 [2001]).

Under the latter, courts may consider such factors as diligence, or lack thereof; the expiration of the statute of limitations; the meritorious nature of the causes of action; the length of the delay in service; the promptness of plaintiff's request for an extension of time; and the prejudice to defendants (*see Spath v Zack*, 36 AD3d 410, 413-414 [1st Dept 2007]).

It is undisputed that Gwinn, when proceeding *pro se*, failed to serve defendants with service of the summons and complaint in compliance with CPLR 306-b. However, this Court finds that Gwinn has established that, at the very least, an extension is warranted under the interest of justice standard. Gwinn made numerous attempts to serve defendants by Fedex and sent defendants additional copies of the pleadings by email (Docs. 12 ¶ 7-11; 13). Further, on or about October 21, 2019, Gwinn hired a process server to serve defendants personally with the summons and complaint (Doc. 17). This conduct was a diligent attempt by a *pro se* plaintiff to effectuate service of process (*see Henneberry v Borstein*, 91 AD3d 493, 496 [1st Dept 2012]). Additionally, the expiration of the statute of limitations on Gwinn's defamation claims and the lack of prejudice to the defendants weight in favor of granting the motion (*see generally Hambric v McHugh*, 289 AD2d 290, 291-292 [2d Dept 2001]) and an extension of time is consistent with this Court's strong interest in deciding cases on the merits (*see Fernandez v McCarthy*, 183 AD3d 539, 540 [1st Dept 2020]; *Hernandez v Abdul-Salaam*, 93 AD3d 522, 522 [1st Dept 2012]). However, to expedite this matter, the Court will allow 90 days for service of the amended summons and complaint instead of the 120 days requested by Gwinn.

Based on the foregoing, that branch of Dellipiane's motion seeking dismissal of the original complaint pursuant to CPLR 3211(a)(8) and CPLR 306-b is rendered moot.

3.) The Mama Gena Defendants' Cross Motion

That branch of the cross motion by the Mama Gena defendants' seeking dismissal of the complaint is denied as improper. Although the CPLR authorizes a party to serve upon a moving party a notice of cross motion demanding relief (*see* CPLR 2215), "[a] cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party" (*Jung v. Argus Realty 202 Llc*, 2020 NYLJ LEXIS 337, 13-14 [Sup Ct, NY County 2020]) and "it is impermissible to move via cross motion against another cross motion" (*PL Diamond LLC v Becker-Paramount LLC*, 16 Misc 3d 1105[A], *12 [Sup Ct, NY County 2007]). Since the Mama Gena defendants are seeking an affirmative relief as against Gwinn, the cross movant, the motion is denied. Assuming, *arguendo*, that the cross motion was not an improper vehicle for the relief sought, it was rendered moot by the amendment of the complaint.

The remaining arguments are either without merit or need not be addressed given the findings above.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff Lovelynn Gwinn's cross motion is granted to the extent that she seeks leave to amend the summons and complaint, pursuant to CPLR 3025(b), in the form annexed to the cross motion (NYSCEF Doc. # 18), as well as permission, pursuant to CPLR 306-b, to reserve defendants with the amended summons and complaint within 90 days after this order is uploaded to NYSCEF, and the cross motion is otherwise denied, and it is further

ORDERED that defendant Tatiana Dellipiane's motion seeking dismissal of the summons and complaint, pursuant to CPLR 306-b, 3211(a)(7) & (8), is denied as moot; and it is further

ORDERED that the cross motion by defendants Regena Thomashauer s/h/a Regina Thomashauer, in her personal capacity and Relationship Technologies LLC d/b/a Mama Gena's School of Womanly Arts, pursuant to CPLR 306-b and 3211(a)(5),(7) & (8), is denied as improper; and it is further

ORDERED that, within 30 days after this order is uploaded to NYSCEF, plaintiff Lovelynn Gwinn shall serve a copy of this order, with notice of entry, upon all defendants; and it is further

ORDERED that this constitutes the decision and order of this Court.

8/20/2020
DATE



KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE