

Bunstine v Kivimaki
2020 NY Slip Op 34560(U)
August 17, 2020
Supreme Court, Westchester County
Docket Number: 65482/2019
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.

P R E S E N T:

**HON. MARY H. SMITH
JUSTICE OF THE SUPREME COURT**

CHARLES W. BUNSTINE II

Also known as: Charles W. Bunstine
Charles William Bunstine
Charles Bunstine,

Plaintiff(s),

- against -

ULLA-MAIJA KIVIMAKI,

Defendant(s).

DECISION & ORDER

Index No.: 65482/2019

Motion Date: 7/10/20

Plaintiff *pro se* moves (Motion #1) by order to show cause for an order, enjoining defendant from making defamatory statements about plaintiff, directing defendant to immediately remove plaintiff’s name from her websites and titles, descriptions, meta data, and content, directing defendant to eliminate plaintiff’s name and any reference to him that might be understood by her prior statements to reference him, and directing defendant to eliminate any statements made by defendant referencing “trademark fraud” and the trademark “Ulla-Maija.”

Plaintiff *pro se* also moves (Motion #2) for summary judgment.

Defendant cross-moves (Motion #3) to dismiss.

The following papers were read:

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Affirmation in Opposition, Affidavit, and Exhibits (3)	3-7
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Memo of Law in Opposition, Affidavit (3), and Exhibits (2) 56-61
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By way of background, on September 27, 2019, plaintiff *pro se* commenced this action, seeking monetary damages relating to alleged defamatory statements made on defendant's website and injunctive relief directing defendant to cease making the alleged defamatory statements and to remove any such statements. On November 13, 2019, defendant *pro se* interposed an answer, which listed the affirmative defenses as "[f]ailure to state a cause of action, unclean hands, lack of damages." On February 26, 2020, plaintiff filed Motion #1, seeking to enjoin defendant from making defamatory statements about plaintiff, directing defendant to immediately remove plaintiff's name from her websites and titles, descriptions, meta data, and content, directing defendant to eliminate plaintiff's name and any reference to him that might be understood by her prior statements to reference him, and directing defendant to eliminate any statements made by defendant referencing "trademark fraud" and the trademark "Ulla-Maija." On that same date, plaintiff filed Motion #2, seeking summary judgment. On March 9, 2020, defendant, by recently retained counsel, filed a letter requesting an adjournment. On March 11, 2020, the Court adjourned Motion ## 1 and 2 to April 2, 2020. However, due to the closure of the Court on March 16, 2020, no additional documents were filed prior to the return date. Upon the reopening of the Court, defendant filed opposition papers as well as Motion #3. On May 11, 2020, the Court restored Motion ## 1 and 2 and afforded the parties an opportunity to file responsive papers and the motions were marked fully submitted on July 10, 2020.

In support of her motion (Motion #3), defendant asserts that the complaint fails to identify which statement on defendant's website is directed towards himself and how that statement is relevant to his trade. Defendant also contends that the complaint fails to allege the claim with the requisite specificity. Defendant asserts that the applicable statute of limitations runs from the date of publication, though republication may toll the statute under certain circumstances. Defendant avers that the subject website was last changed on April 28, 2017 and, as such, plaintiff's claim is barred by the statute of limitations.

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]).

"To state a cause of action alleging defamation, a plaintiff must allege that the defendant published a false statement, without privilege or authorization, to a third party,

constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation *per se*” (*Rosner v Amazon.com*, 132 AD3d 835, 836-37 [2d Dept 2015]). A false statement causes special harm when it causes “the loss of something having economic or pecuniary value . . .” (*Gaccione v Scarpinato*, 137 AD3d 857, 859 [2d Dept 2016]). “A false statement constitutes defamation *per se* when it charges another with a serious crime or tends to injure another in his or her trade, business, or profession” (*Geraci v Probst*, 61 AD3d 717, 718 [2d Dept 2009], *affd as mod and remanded*, 15 NY3d 336 [2010]).

Here, the complaint alleges, among other things, that defendant updated her website on May 25, 2019 and “published defamatory matter relative to the plaintiff and tagged the name of the plaintiff so that this defamatory matter would be found through Internet search engines when the plaintiff’s name was entered into a search engine” (Complaint ¶ 5). The complaint also alleges defendant published the following statement on the website:

“Federal trademark fraud ‘Ulla-Maija’ mark - Book Project
‘Lotus of Lapland’,
<https://www.lotusoflanland.com/document-2.html>, Federal
Trademark Fraud 2002-2012: ‘Ulla-Maija’ Trademark.
Picture. Ulla-Maija Trademark Fraud by Charles Bunstine.
Picture. Continues.’ made and published by the defendant is
false as it pertains to plaintiff and the crime of trademark fraud.

(Complaint ¶ 7). The complaint further alleges in pertinent part that the website contains under the section “Book Project Main Page” the following statement “Fraudulent documents were filed at the United States Patent & Trademark Office: [View fraudulent trademark filing documents of ‘Ulla-Maija’ trademark \(USPTO\)](#)” (Complaint ¶ 8). Plaintiff alleges that these statements, that plaintiff has done something fraudulent in his business dealings and in connection with defendant, are false (Complaint ¶¶ 7-8).

The Court notes that upon clicking the link “[View fraudulent trademark filing documents of ‘Ulla-Maija’ trademark \(USPTO\)](#)” on defendant’s website, one is taken to an array of documents, some of which appear to relate to plaintiff’s endeavors, as Chairman and CEO of Ulla-Maija, Inc. to trademark the name “Ulla-Maija” on behalf of Ulla-Maija, Inc. The complaint further alleges that “[i]n truth, the defendant sold majority interest in her company to a group of investors in 1997. At the end of the defendant’s employment agreement in May of 2000, the board of directors did not renew it” (Complaint ¶ 8).

Based in part hereon, affording the complaint a liberal construction, accepting the alleged facts as true, according plaintiff the benefit of every possible favorable inference, and simply determining whether the alleged facts fit within any cognizable legal theory, the complaint sufficiently alleges a claim for defamation. Accordingly, defendant’s motion

pursuant to CPLR 3211 (a) (7) is denied. Next, the Court considers defendant's motion to dismiss based on the applicable statute of limitations.

A defendant may assert the defense that the action is barred by the applicable statute of limitations by way of a pre-answer motion or, after raising it as an affirmative defense, in a motion for summary judgment (*see Wan Li Situ v MTA Bus Co.*, 130 AD3d 807, 808 [2d Dept 2015]). The defense is waived if not made in a pre-answer motion or raised as an affirmative defense (*see 352 Legion Funding Assoc. v 348 Riverdale, LLC*, 164 AD3d 551, 552-53 [2d Dept 2018]). Of course, a defendant may move to amend her pleading to assert this affirmative defense (*see Giuffre v DiLeo*, 90 AD3d 602, 603 [2d Dept 2011]).

Here, as noted above, defendant interposed an answer prior to making a motion to dismiss pursuant to CPLR 3211 (a) (5) and did not raise the affirmative defense of statute of limitations in her answer. Accordingly, defendant's motion pursuant to CPLR 3211 (a) (5) is denied. Next, the Court considers plaintiff's motions.

In support of his motion for preliminary injunction (Motion #1) and for summary judgment (Motion #2), plaintiff asserts that defendant's website contains defamatory statements that plaintiff has committed the crime of fraud in his business dealings with defendant and that the website was updated on May 25, 2019. As noted above, defendant avers, among other things, that the website was last changed on April 28, 2017.

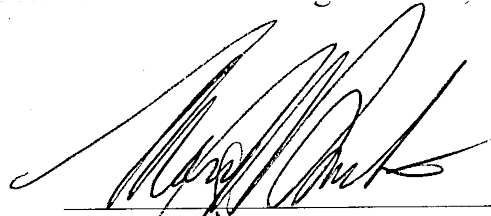
A claim for defamation is subject to a one-year statute of limitations (*see CPLR 215 [3]*). The statute of limitations begins to run from the original publication of the alleged defamatory statement (*see Firth v State*, 98 NY2d 365, 369 [2002], citing *Gregoire v G. P. Putnam's Sons*, 298 NY 119, 123 [1948]). However, the statute of limitations may be retriggered under certain circumstances if the alleged defamatory statement is republished (*see Firth*, 98 NY2d at 371-72; *Levy v Smith*, 132 AD3d 961, 963 [2d Dept 2015]; *Martin v Daily News L.P.*, 121 AD3d 90, 103 [1st Dept 2014]).

In order to prevail on a motion for a preliminary injunction, the movant must demonstrate, among other things, a likelihood of success on the merits by clear and convincing evidence (*see Gluck v Hoary*, 55 AD3d 668, 668 [2d Dept 2008]). Given the issue regarding republication, plaintiff has not demonstrated by clear and convincing evidence a likelihood of success on the merits. Accordingly, plaintiff's motion (Motion #1) for a preliminary injunction is denied.

It is well settled that where conflicting affidavits and other contradictory evidence is submitted, summary judgment is not appropriate (*see Webar, Inc. v Capra*, 212 AD2d 594, 596 [2d Dept 1995]). The reasoning is that it is not within the purview of the Court to resolve issues of credibility on a motion for summary judgment (*see Halkias v Otolaryngology-Facial Plastic Surgery Associates, P.C.*, 282 AD2d 650, 651 [2d Dept 2001]). Given the issue regarding republication, summary judgment is not appropriate at

this juncture. Accordingly, plaintiff's motion (Motion #2) for summary judgment is denied with leave to remake the motion at the close of discovery.

Dated: August 17, 2020
White Plains, New York



HON. MARY H. SMITH
Justice of the Supreme Court