

Xiaoqian Gu v Lehmann-Maupin L.L.C.

2022 NY Slip Op 31082(U)

March 31, 2022

Supreme Court, New York County

Docket Number: Index No. 657157/2020

Judge: Louis L. Nock

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. LOUIS L. NOCK PART 38M

Justice

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XIAOQIAN GU,

Plaintiff,

- v -

LEHMANN-MAUPIN L.L.C.,

Defendant.

INDEX NO. 657157/2020

MOTION DATE 05/19/2021,
07/07/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 12, 13, 14, 15, 16, 17, 26, 27, 28, and 29

were read on this motion to DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 18, 19, 20, 21, 22, 23, 24, 25, 30, 31, and 32

were read on this motion to AMEND CAPTION/PLEADINGS

Upon the foregoing documents, it is hereby ordered that the motion by defendant Lehmann-Maupin L.L.C. (“defendant”) to dismiss the second cause of action in the first amended complaint and to strike certain matter therefrom (Mot. Seq. No. 001) is granted, and the motion by plaintiff Xiaoqian Gu (“plaintiff”) for leave to file a second amended complaint (Mot. Seq. No. 002) is granted in part, for the reasons set forth on the argument record of January 6, 2022, as reflected below.

In this action for breach of contract, plaintiff alleges causes of action for breach of contract and defamation arising out of the sale of a particular work of art, and the resulting fallout from the failed consummation of that sale. Defendant moves to dismiss the cause of action for defamation for failure to state a claim pursuant to CPLR 3211(a)(7) and, in the event the court grants dismissal of that claim, to strike all references thereto from the amended complaint pursuant to CPLR 3024(b). In response, plaintiff seeks leave to submit a second

amended complaint, in which she adds additional allegations regarding her defamation claim and two additional causes of action for tortious interference with business relations and tortious interference with contract. The court heard argument on both motions on January 6, 2022.

As stated in the transcript of that day's argument, a copy of which is annexed hereto, plaintiff chose to seek leave to file a second amended complaint rather than stand on the first amended complaint, and, therefore, defendant's motion to dismiss the defamation claim alleged in the first amended complaint is granted. With regard to plaintiff's motion for leave to amend, "[l]eave shall be freely given upon such terms as may be just" (CPLR 3025[b]). Absent undue delay, prejudice, or surprise, and provided the proposed amendment arises from the same transactions and occurrences as the original complaint, the motion should be granted (*Fellner v Morimoto*, 52 AD3d 352, 353 [1st Dept 2008]). Here, the record does not support a finding of undue delay, prejudice, or surprise, and the proposed second amended complaint arises from the same transactions and occurrences original and amended complaints.

Plaintiff alleges two separate communications that are the basis of her defamation claims between proposed defendant Rachel Lehmann and Almine Rech, plaintiff's former employer, one in November 2019, and another in January 2021. For the reasons set forth in defendant's papers and in the argument record, the court finds that the January 2021 communication is protected by the litigation privilege (*e.g. Pomerance v. McTiernan*, 51 A.D.3d 526, 528 [1st Dep't 2008] ["The privilege embraces anything that may possibly be pertinent or which has enough appearance of connection with the case"]) [internal quotation marks and citations omitted]). Thus, allegations related to the January 2021 communication should be stricken from the proposed second amended complaint.

Finally, plaintiff seeks to assert causes of action for tortious interference with business relations and tortious interference with contract based upon Lehmann's alleged defamatory statements (NYSCEF Doc. No. 20, ¶¶ 69-73, 78-81). Generally, [a] cause of action is duplicative where it arises from the same facts and alleges the same damages as another asserted claim (*e.g. Soni v Pryor*, 102 AD3d 856, 858 [2d Dept 2013]). A tortious interference cause of action is duplicative of a defamation claim where it arises out of the alleged defamatory conduct and seeks damages on the same theory of recovery (*see Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63, 64 [1st Dept 1993] ["The IAS court properly rejected plaintiff's attempt to bring a defamation action against the defendants . . . in the guise of an economic tort, as well as the plaintiff's attempt to cast its defamation claim as tortious interference with business relations"]). Accordingly, plaintiff's proposed tortious interference claims are "palpably insufficient" (*Fairpoint Companies, LLC v Vella*, 134 AD3d 645 [1st Dept 2015]).

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss the second cause of action of the first amended complaint is granted; and it is further

ORDERED that the plaintiff's motion for leave to amend and file a second amended complaint is granted, in part, as follows: leave is granted to amend the second cause of action as set forth in the proposed amended complaint in the form annexed to the moving papers with the exception of the allegations related to the January 2021 communication between Rachel Lehmann and Almine Rech, but leave is denied with respect to the proposed third and fourth causes of action; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry and the amended complaint in conformity herewith; and it is further

ORDERED that the defendant shall answer the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a virtual preliminary conference via Microsoft Teams, on June 1, 2022, at 10:00 AM.

This constitutes the Decision and Order of the court.



<u>3/31/2022</u>			<u>LOUIS L. NOCK, J.S.C.</u>		
DATE					
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE	
		<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER