

Sternberg v Wiederman
2022 NY Slip Op 35228(U)
March 23, 2022
Supreme Court, Rockland County
Docket Number: Index No. 35076/2021
Judge: Sherri L. Eisenpress
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X

CHANE RACHEL STERNBERG and
HAATZAMA, INC.,

Plaintiffs,

DECISION AND ORDER

-against-

Index No. 35076/2021
Order Date Mar. 23, 2022
Motion Seq. 1

NAOMI WIEDERMAN (née HOLLAND),

Defendant.

-----X

EISENPRESS, J.

The following papers filed to NYSCEF as Documents 1-20 were read on this Notice of Motion by defendant for an Order dismissing this action pursuant to CPLR 306-b for failure to serve timely the summons and complaint or, in the alternative, pursuant to CPLR 3211(a)(7) for failure to state a claim on which relief can be granted.

Upon the foregoing papers, the motion is determined as follows:¹

Plaintiffs Chane Sternberg and her business entity, Haatzama, Inc., commenced this action for defamation and tortious interference with business relations by summons and complaint filed on August 27, 2021. According to their affidavit of service, plaintiffs effected “affix and mail” service of the commencement papers on defendant by affixing them to her door on December 20, 2021, and mailing them on December 21, 2021, compatibly with CPLR 308(4) (*see* NYSCEF 2). The affidavit of service was filed December 29, 2021 (*see id.*), and thus service was deemed complete 10 days later, on January 8, 2022 (*see* CPLR 308[4]). Defendant moves to dismiss this action for service untimely under CPLR 306-b or, in the alternative, under

¹ The pending ex parte application to admit plaintiff’s counsel, Michael Fasano, Esq., *pro hac vice* is granted.

CPLR 3211(a)(7) on grounds that the complaint does not sufficiently explicate the alleged defamation to state a cause of action.

While the parties' submissions suggest a contentious dispute between the current and former spouse of a nonparty, and allege implications to business relations, those matters are not properly before the Court at this time. Defendant correctly shows that service was completed 14 days after the 120-day deadline (*see* CPLR 306-b). Defendant also carries her burden to plead that plaintiffs failed to undertake reasonably diligent efforts to serve defendant more timely. According to the affidavit of service, the first attempt at service did not occur until December 16, 2021 – nearly four months after plaintiffs' filed the summons and complaint. Accordingly, defendant argues that CPLR 306-b requires this Court to dismiss the action without prejudice.

This Court agrees with plaintiffs, however, that good cause warrants a service extension under the CPLR 306-b "interest of justice" standard (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95 [2001]). As the *Leader* Court aptly noted, this Court enjoys substantial discretion to consider all appropriate factors, including "diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for an extension of time, and prejudice to defendant" (*id.*, at 105-106).

Applying the record evidence to these factors, the Court finds that plaintiffs carry their burden to extend service time under CPLR 306-b. First, plaintiffs are at most two weeks late – a relatively short time, especially in context. Plaintiffs' claims here are functionally equivalent to a Federal action that plaintiffs commenced against defendants (*see Sternberg v Wiederman*, 21-cv-5403-LAP [SDNY 2021]), which was dismissed for lack of diversity jurisdiction. Plaintiffs did not seek to complete service of the commencement papers in this action until soon after the Federal action was dismissed – an approach that was reasonable given the obvious judicial economy harms of prosecuting functionally the same claims simultaneously in two different courts. Moreover, because the Federal action gave defendant actual notice of this action's claims, neither defendant nor defense counsel – the same attorneys in both actions – reasonably

can plead prejudice. Indeed, they do not plead prejudice at all. This Court also notes a potential limitations-period concern were this Court to dismiss this action in favor of re-commencement: it appears that the personal plaintiff claims to have lost institutional employment in September 2020 and then “almost simultaneously” lost a substantial portion of her private counseling practice (*see* Compl [NYSCEF 1], at ¶¶ 13-14) – losses that plaintiffs impute to defendant’s alleged defamation. Because plaintiffs do not precisely specify when the alleged defamation occurred, the one-year limitation period for a defamation action (*see* CPLR 215[3]) could be relevant were plaintiffs required to re-commence this action. Thus, plaintiffs could be substantially prejudiced on account of a 14-day delay that caused defendant no prejudice whatsoever. For the foregoing reasons, defendant’s motion to dismiss for untimely service is denied.

Turning to the branch of defendants’ motion to dismiss the defamation claim under CPLR 3211(a) on grounds of vagueness, this Court agrees with plaintiffs’ counsel that the heightened pleading requirement of CPLR 3016(a) need not be formalistically applied where plaintiffs themselves did not hear the allegedly defamatory words or who said them. Construing the pleadings in the light most favorable to plaintiffs, the central allegation is that the personal plaintiff’s brother heard rumors that the personal plaintiff’s institutional employer was “getting heat” after it “was informed by a third party of a rumor” that allegedly comprises the defamatory statement (Compl., at ¶ 15). While this claim might be double hearsay, complaint’s further assertion that the personal plaintiff and her partner – who formerly was defendant’s partner – “investigated the matter” and have “witnesses who will come forward and testify that they heard directly [from defendant]” the allegedly defamatory words (*id.*, at ¶ 18). Thus, it is premature, at this discovery stage, to conclude as a matter of law that plaintiffs will be unable to adduce admissible evidence to support their claim.

Neither does this Court find that the defamation claim is inherently duplicative with the tortious interference claim. Construing the pleadings in the light most favorable to plaintiffs, the alleged reputational damage of defamation is distinct from allegedly interfering with the personal plaintiff’s professional relationship with then-current and future mental health clients

both with the institutional employer and in her private practice. Plaintiffs' complaint also pleaded the requisite causation elements as to both causes of action. Contrary to defendants' assertion, the personal plaintiff need not plead more to survive dismissal.

The Court has considered defendant's remaining contentions and deem them to lack merit or moot in light of the foregoing.

Accordingly it is hereby

ORDERED that defendant's motion is denied; and it is further

ORDERED that plaintiffs' service of the complaint on defendant is deemed timely nunc pro tunc pursuant to CPLR 306-b; and it is further

ORDERED that defendant shall interpose an answer to the complaint within 20 days of service hereof on her consistent herewith; and it is further

ORDERED within 10 days hereof, counsel for plaintiffs shall serve this Decision and Order, with Notice of Entry, on counsel for defendant via NYSCEF; and it is further

ORDERED that the parties shall appear for a Preliminary Conference on **May 12, 2022 at 9:50 a.m. via Microsoft Teams**. Link to be provided the day prior.

The foregoing constitutes the Decision and Order of this Court.

Dated: New City, New York
March 23, 2022



HON. SHERRY L. EISENPRESS, A.J.S.C.

To: All counsel via NYSCEF