

**Howe v Kelly**

2023 NY Slip Op 33667(U)

October 17, 2023

Supreme Court, New York County

Docket Number: Index No. 150707/2023

Judge: Lynn R. Kotler

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

PART 8

Tina Howe

INDEX NO. 150707/2023

- v -

Thomas M. Kelly et al

MOT. DATE

MOT. SEQ. NO. 1-3

The following papers were read on this motion to/for dismiss (seq 1)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 32-48
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 77
Replying Affidavits NYSCEF DOC No(s).

The following papers were read on this motion to/for dismiss (seq 2)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 50-73
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 78
Replying Affidavits NYSCEF DOC No(s). 81

The following papers were read on this motion to/for

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 83-86
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 89-96
Replying Affidavits NYSCEF DOC No(s). 97

This is an action for various torts against a host of individuals as well as the school which plaintiff Tina Howe's minor child previously attended, Horace Mann School (sometimes the "school"). There are three motions pending in this action which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 1, defendant Sally Zhang moves for an order dismissing plaintiffs' complaint against her pursuant to CPLR § 3211(a) (1) and (7), or in the alternative pursuant to CPLR § 3211 (c) as a motion for summary judgment. In motion sequence 2, defendants Horace Mann School, Thomas M. Kelly and Sally Zhang move for an order dismissing the complaint pursuant to CPLR § 3211 (a) (1), (5) and (7). Finally, in motion sequence 3, defendants James Jiang and Sherry Hou move to dismiss plaintiff's complaint against them pursuant to CPLR § 3211 (a) (7). Plaintiffs Tina Howe and Howe's Minor oppose all three motions and cross-move on motion sequence 3 to amend the complaint pursuant to CPLR § 3025(b)-(c). Defendants Jiang and Hou oppose plaintiffs' cross-motion. The remaining defendants Ying Chen, Dong Di Pan, Kelly Zhong and Dele Zhong i/s/h/a Charlie Zhong (together with Kelly Zhong, the "Zhongs") have answered the complaint but have not taken a position with respect to any of the motions before the court.

The court will first consider plaintiffs' cross-motion to amend, since its disposition necessarily

Dated: 10/17/23

[Signature]
HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [ ] CASE DISPOSED [X] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [ ] GRANTED [ ] DENIED [ ] GRANTED IN PART [X] OTHER
3. Check if appropriate: [ ] SETTLE ORDER [ ] SUBMIT ORDER [ ] DO NOT POST
[ ] FIDUCIARY APPOINTMENT [ ] REFERENCE

impacts the remainder of the instant motions. Leave to amend a pleading pursuant to CPLR 3025[b] should be freely given in the absence of prejudice or surprise to the non-moving party (*Fahey v. Ontario County*, 44 NY2d 934 [1978]; see also *Seda v. New York City Housing Authority*, 181 AD2d 469 [1st Dept 1992]). The opponent of a motion to amend bears the burden of demonstrating prejudice (*Seda, supra* at 470). Prejudice does not occur simply because a defendant is exposed to greater liability or has to expend additional time preparing its case (*Jacobson v. McNeil Consumer & Specialty Pharmaceuticals*, 68 AD3d 652 [1st Dept 2009]). “Rather, prejudice occurs when the party opposing amendment has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position” (*id.* quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 NY2d 18 [1981] [internal quotations omitted]). A motion to amend should be denied where it is “clear and free from doubt” that the proposed claim lacks merit (*Hawkins v. Genesee Place Corp.*, 139 AD2d 433 [1st Dept 1988]).

The original complaint was filed by plaintiff Tina Howe, pro se. Since commencing this action, Howe retained counsel who explains that plaintiff is a non-native English speaker. Plaintiffs have provided a redlined copy of their proposed amended complaint which based upon the courts’ review, does not make any significant changes to the substantive allegations asserted. Indeed, as defendants Jiang and Hou assert, the proposed amended complaint only seeks to add one substantive paragraph adding dates plaintiffs encountered the allegedly defamatory material. Nonetheless, Jiang and Hou argue that the proposed amended should be denied because it would be futile as the proposed allegations are without merit. The court will grant the amendment and consider the amended complaint in connection with the pending motions to dismiss, which the court now turns to.

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 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), “dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*Leon v. Martinez, supra* at 88). Plaintiffs have asserted seven causes of action. The court will consider each in turn.

#### First cause of action

The first cause of action is for defamation and “libeling”. Plaintiffs claim that defendants Kelly, Hou, Jiang, Chen, Pan, Zhongs and Zhang made false and defamatory statements and accusations in the form of pictures and posters, collectively and individually against plaintiff and published such information without permission to the internet, social media, wechat groups, app 168, online review platforms, and other user-generated content platforms, at physical facilities at Brooklyn and Bronx, New York.

The complaint alleges that several posters containing various language were posted “on Chinese social media, news, [and] wechat groups”. The first poster allegedly read:

“to All Chinese, 812 60 Street, 6 Floor, ( where Plaintiff’s law office is located) Chinese enemy, viscous person ( Tina Howe) has been committed fraudulence for a long time to Chinese by taking their money and wealth, she has lied to Chinese for a long time. She has contempt law. This person knows the law and violated the law. She has lost the bottom line of a human being, many houses have been taken by her with fake ID, using others money, using her ID to change the property’s name to her own name. put the house on mortgage, and take the house for her own. She tricked investors to buy real estate property as a bite, changed the deed of the property, took others capital. All Chinese, all people de-

frauded by her, stand out, let's beat this lawyer, remove the cancer from our community, so no more Chinese will be her victim, please call me 646 719 6240".

Supposedly, the number listed in the first poster belongs to defendant Chen, who allegedly "picked up the telephone" when "[s]everal clients called the number" and said "Plaintiff committed fraudulence and please gather all her crime and report her under my leadership. Don't be afraid, I have a big boss supporting me."

Plaintiff claims that the poster was observed on November 18, 2022 and has annexed to her complaint photographs of the poster along with a certified translation. The certified translation, however, reads as follows:

Tina Howe, an unscrupulous and disgraceful lawyer, through the scammer headed by Jack Hu, solicits customers and lobbyes (sic) on Eighth Avenue every day, and keeps attracting people who want to buy houses to 81260st BK, where the Law Offices of Tina Howe is located. They use the bait of group buying houses to deceive and trick investors into investing money in various pre-set traps, including buying houses, lands, warehouses, growing marijuana, and so on. After collecting the investors' money, they start playing various tricks and acting unscrupulously. They avoid answering phone calls, ignore messages on WeChat, and even block people's contact. Taking advantage of their positions as lawyers, Tina and Jack Hu have been engaged in fraudulent activities for a long time. They falsify documents, forge signatures, and fabricate false notarizations to illegally obtain ownership and mortgage loans of investors' properties. It is currently known that nearly tens of millions of dollars have been defrauded by them. All investors not only lose their investments but also have to bear substantial legal fees. More than ten cases have been filed and are currently in litigation and court proceedings. She has completely lost the ethical standards that a lawyer should possess. She shows contempt for the law and challenges the law in person.

Xiugan Zheng, Jack Hu, and Tina Howe, as the leaders of a three-person fraud gang, have been involved in flipping real estate contracts in the Chinese community over the past decade. They are also the main culprits responsible for inflating property prices on 8th Avenue, earning a significant amount of cash under the table. They have been involved in transactions of over a hundred properties, defrauding Chinese compatriots of an amount nearing tens of millions of dollars. They also continue to launder money by exchanging cash for checks from other companies every month, tax avoidance, tax evasion, and huge amounts. They have long been targeted by government investigations, and it is hoped that all Chinese compatriots will not be deceived any further by these scammers. Everyone must bravely come forward to report and expose them, working together to bring these three scoundrels to justice and swiftly send them to prison. Only then can our society be stable and prosperous.

Plaintiff has also annexed screenshots of alleged "true copies of dated WeChat social media group re-publications of the Poster published on the following dates: August 20<sup>th</sup>, 2022, November 8, 2022 and December 3, 2022." No certified translations of the Chinese language contained in these screenshots has been provided to the court.

Plaintiffs further claim that defendant Chen, Pan and Zhongs "instructed their family members, friends, associates, etc., placed such posters in public places in the community of Sunset [P]ark, Brooklyn." Plaintiff further alleges that defendants Chen and Pan "listed the poster by hanging up at the back of the driver's seat so each of the passengers was able to see the poster, which reads:

Tina Howe, a viscous liar has been committing fraudulence for a long time to Chinese by taking their money and wealth. She has contempt law. This person knows the law and violated the law. She has lost the bottom line of a human being. All Chinese, lets punish her and recognize her real color so as not to be fooled again by her.

Plaintiffs additionally claim that defendants Hou and Jiang drafted a new version of a "statement in Chinese for Chen, Pan, Zhongs" which reads

Law offices of Tina Howe defraud clients, Chinese guy asked the Chinese community to send them to jail: to All Chinese, 812 60 Street, 6 Floor,( where Plaintiff's law office is located) Chinese enemy, viscous person ( Tina Howe) has been committed fraudulence for a long time to Chinese by taking their money and wealth, she has lied to Chinese many times. She has contempt law. This person knows the law and violated the law. She has lost the bottom line of a human being, many houses have been taken by her with fake ID, using others money, using her ID to change the property's name to her own name. put the house on mortgage and take the house for her own. She tricked investment to real property as a bite, changed the deed of the property, took others capital. All Chinese, all people defrauded by her, stand out, let's beat this lawyer, remove the cancer from our community, so no more Chinese will be her victim, please call me 646 719 6240

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014] citing *Foster v. Churchill*, 87 NY2d 744, [1996]). Whether the statements constitute fact or opinion is a question of law for the court to decide (*Silsdorf v. Levine*, 59 NY2d 8 [1983] cert denied 464 US 831).

The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon, supra* at 38).

In evaluating the viability of a defamation claim, the words must be construed in the context of the entire statement before an ordinary audience, and if the statement is not reasonably susceptible to a defamatory meaning, the claim is not actionable (*Silsdorf v. Levine*, 59 NY2d 8 [1983] cert denied 464 US 831). "Courts will not strain to find defamation where none exists" (*Dillon, supra* at 38 [internal quotation omitted]).

All but the first poster alleged in plaintiff's amended complaint is unactionable, as plaintiffs must allege the actual defamatory words in their complaint, not their English translation of whatever they observed. Moreover, no dates of publication have been provided for any of the allegedly defamatory material.

As for the only defamatory statement which plaintiffs have provided an English language translation for, the particular words in English have not been alleged in the complaint. Moreover, defendants argue that plaintiff's defamation claim is untimely, and that merely observing the poster on the street in November 2022 is insufficient to demonstrate that it was published within a year before this action was brought. The court agrees. The complaint is devoid of sufficient facts which outline when the actionable poster was first published. Plaintiff's counsel's reliance on the "continuing wrong" doctrine does not

save the claim, as a cause of action for defamation accrues upon publication, not discovery, and republication does not automatically renew the statute of limitations (see *Nussenzweig v. DiCorcia*, 9 NY3d 184 [2007]; *Rand v. New York Times Co.*, 75 AD2d 417 [1980]; *Firth v. State of New York*, 306 AD2d 666 [3d Dept 2003] quoting *Firth v. State*, 98 NY2d 365 [2002] ["Republication, an exception to the single publication rule, justifies renewing the statute of limitations when the subsequent publication is intended to and actually reaches a new audience" (internal quotations omitted)]).

Therefore, the first cause of action against Kelly, Hou, Jiang and Zhang is severed and dismissed.

#### Second cause of action

Plaintiffs' second cause of action is for wrongful termination against the school and Kelly. This claim is defective, insofar as the court reasonably construes this claim to be one for retaliatory termination, which only lies against an employer by a former employee. Since that relationship does not exist between plaintiffs and the school or Kelly, this cause of action is also severed and dismissed.

#### Third cause of action

The third cause of action is for discrimination against Kelly, only. Plaintiff has not alleged discrimination in violation of a particular law such as federal, state or local (see i.e. Title VII of the Civil Rights Act of 1964, the New York State Human Rights Law, Executive Law § 296, *et seq.* and the New York City Human Rights Law, Admin Code § 8-101, *et seq.*). Otherwise, the court cannot discern a viable cause of action for discrimination against Kelly based on the allegations contained in plaintiffs' amended complaint. Therefore, this cause of action is severed and dismissed.

#### Fourth cause of action

Plaintiffs' fourth cause of action is for breach of fiduciary duty against Kelly in his capacity as principal of the school as well as against the school itself. The elements of a cause of action for breach of fiduciary duty are: [1] the existence of a fiduciary relationship; [2] misconduct by the defendant; and [3] damages directly caused by the defendant's misconduct (*Litvinoff v. Wright*, 150 AD3d 714 [2d Dept 2017]). Again, absent from plaintiff's amended complaint are any allegations that Kelly or the school owed plaintiffs a fiduciary duty. Therefore, this claim is also severed and dismissed.

#### Fifth cause of action

The fifth cause of action is for unjust enrichment against defendants Kelly, Hou, Jiang, Pan and Zhongs for "illegally take possession of plaintiff's property located at 1038 38 Street, Brooklyn, New York." Plaintiffs claim that Kelly, Hou, Jiang, Pan and Zhongs "share the monthly rental income" and "collectively leased the property for their personal gain", plaintiff has incurred legal expenses totaling \$50,000 "in litigation of this property" and "[p]laintiff's furniture, Laptop, valuables, and tenants' valuables totaling \$150,000.00 has been usurped" by said defendants. Plaintiff further alleges that these defendants "stole" from plaintiff's corporate entity for over a year and "embezzled \$50,000.00 from Plaintiff's bank accounts."

An unjust enrichment claim is a quasi-contract arising when a defendant was enriched at plaintiff's expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analytics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). An unjust enrichment claim does not lie where there is an enforceable agreement between the parties (*Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456 [1st Dept 2010] citing *Singer Asset Fin. Co., LLC v. Melvin*, 33 AD3d 355, 358 [2006]).

To the extent that defendants Kelly, Zhang and the school argue this claim should be dismissed against them, the court notes that plaintiffs have not asserted any allegations against Zhang or the school on this cause of action. Otherwise, the court agrees that plaintiff's allegations against Kelly lack

sufficient factual support to establish every element of this cause of action. Therefore, the motion by Kelly, Zhang and the school to dismiss the fifth cause of action against Kelly is granted.

Defendants Jiang and Hou argue that the exhibits in support of plaintiffs' fifth cause of action do not reference them and further claim "that this entire dispute is from a loan of \$400,000 provided by Hou/Jiang to plaintiff Tina Howe, which was never repaid." To the extent that there was some business relationship between Jiang, Hou and Howe, the precise nature of which the court cannot discern, the court dismisses this claim with leave to replead against Jiang and Hou within 30 days.

#### Sixth cause of action

Plaintiff's sixth cause of action is for civil conspiracy. New York does not recognize a cause of action for conspiracy (see i.e. *Riverbank Realty Co. v. Koffman*, 179 AD2d 542 [1st Dept 1992]). Accordingly, this cause of action is severed and dismissed.

#### Seventh cause of action

The seventh cause of action is for conversion, whereby plaintiffs allege that defendants Kelly, Hou, Jiang, Chen, Pan, Zhang and Zhongs have [1] taken plaintiff's Corporation documents, banking account and real estate property and "have taken plaintiff and her tenants valuable sic) inside the property". The elements of a cause of action in conversion are the plaintiff's right to possession, intent of the defendant, and defendant's interference with plaintiff's property rights to the exclusion of plaintiff's rights (*Komolov v. Segal*, 101 AD3d 639 [1st Dept 2012]).

The court finds that plaintiff has failed to allege sufficient facts to support this cause of action as against Kelly or Zhang. Absent from the complaint are any facts which would substantiate the necessary elements of the claim regarding these defendants' intent and their interference with plaintiff's property rights. Accordingly, the court dismisses the seventh cause of action against Kelly and Zhang.

The seventh cause of action against Jiang and Hou is also dismissed for the same reasons, except that since there was a business relationship between these defendants and Howe, the court will grant plaintiffs leave to replead this claim against Jiang and Hou, only, within 30 days.

#### **CONCLUSION**

Accordingly, it is hereby

**ORDERED** that motion sequences 1 through 3 are decided as follows:

[1] plaintiffs' cross-motion on motion sequence 3 to amend the complaint is granted and the amended complaint is deemed served and filed;

[2] the first cause of action against defendants Kelly, Hou, Jiang and Zhang is severed and dismissed;

[3] the second, third, fourth, and sixth causes of action are severed and dismissed;

[4] the fifth cause of action against Kelly is severed and dismissed; and

[5] the seventh cause of action against Kelly and Zhang is severed and dismissed; and

[6] the fifth and seventh causes of action against Jiang and Hou are severed and dismissed with leave to replead within 30 days.

And it is further **ORDERED** that Kelly, Zhang and the Horace Mann School be removed from the caption of this action as party defendants upon service of this order with notice of entry upon the County Clerk and the Clerk of Trial Support, who shall amend their records accordingly; and it is further

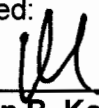
**ORDERED** that upon expiration of the thirty day timeline for plaintiffs to replead the fifth and seventh cause of action against Jiang and Hou, in the event that plaintiff does serve and file a second amended complaint, all remaining named defendants shall serve and file an answer thereto or otherwise respond within 20 days. If plaintiffs do not replead the fifth and seventh causes of action, Ying Chen, Dong Di Pan, Kelly Zhong and Dele Zhong i/s/h/a Charlie Zhong shall file an Amended Answer within 20 days from November 20, 2023; and it is further

**ORDERED** that the balance of motion sequences 1-3 are denied; and it is further

**ORDERED** that on or before January 9, 2024, plaintiffs' counsel shall file a letter advising as to the status of this action and requesting a preliminary conference in this matter unless there are pending motions filed in the interim.

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: 10/17/23  
New York, New York

So Ordered:   
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Hon. Lynn R. Kotler, J.S.C.