

Foster v Matlock

2012 NY Slip Op 31363(U)

May 15, 2012

Sup Ct, New York County

Docket Number: 110365/11

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY
Justice

PART 8

Kevin R. Foster,

INDEX NO. 110365/11

- v -

MOTION DATE 1/30/12

Lashonda J. Matlock, et al.,

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 11 were read on this motion to for denial

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... <u>+ Memo y LAW</u>	<u>1-5</u>
Answering Affidavits — Exhibits <u>+ Memo y LAW</u>	<u>6-8</u>
Replying Affidavits <u>+ Memo y LAW</u>	<u>9-11</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED

MAY 22 2012

Dated: May 15, 2012

Joan M. Kenney
NEW YORK COUNTY CLERK'S OFFICE
J.S.C.

JOAN M. KENNEY

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

-----x

KEVIN R. FOSTER,
Plaintiff,

-against-

LASHONDA J. MATLOCK, SANDRA ROSE,
also known as SANDRA ROSE HENDRICKS
and NECOLE KANE, also known as
NECOLE JEMEAN KANE,
Defendants.

-----x

JOAN M. KENNEY, J.:

DECISION & ORDER
Index No.: 110365/11

FILED

MAY 22 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendant Sandra Rose a/k/a Sandra Rose Hendricks (Rose) seeks an Order, pursuant to CPLR 3211 (a) (7) and (8), to dismiss the complaint or, in the alternative, to dismiss: the first cause of action, pursuant to CPLR 3211 (a) (1), (5) or (7); the second cause of action, pursuant to CPLR 3211 (a) (7); the third cause of action, pursuant to CPLR 3211 (a) (5) or (7); and the fourth cause of action, pursuant to CPLR 3211 (a) (7).¹

FACTUAL BACKGROUND

Briefly, the complaint alleges that, without plaintiff's knowledge or consent, Rose, an interactive website operator, published a false internet post about him, on or about December 21, 2009, authored by defendant Lashonda J. Matlock (Matlock). According to the complaint, the alleged, false internet posting about him was in the form of a letter from Matlock to Rose that

¹It is noted that defendant Necole Kane a/k/a Necole Jemean Kane has failed to answer the complaint, and the complaint asserted as against Necole Kane a/k/a Necole Jemean Kane was discontinued by stipulation of the parties.

includes plaintiff's photograph and discusses marital infidelity, how private photographs can become public, thereby wreaking personal and professional havoc, and identifies plaintiff as a "celebrity accountant" (see Motion Exhibit A).

Summarily, the complaint alleges four causes of action: (1) defamation; (2) violation of section 349 of the New York General Business Law (GBL); (3) violation of sections 50 and 50-C of New York Civil Rights Law; and (4) emotional distress and loss of business opportunities.

The primary thrust of Rose's argument for dismissal, is her claim that this Court lacks jurisdiction over her person. In support of this contention, defendant Rose submits an affidavit affirming that she: is a resident of Georgia; maintains bank and other financial accounts in Georgia; pays taxes in Georgia; has no substantial, purposeful, systematic or continuous contacts with New York; has never availed herself of any of the benefits or protections of New York laws; that the claims alleged herein do not arise out of any of her activities in New York; that her website operates out of Georgia; that she uses computer servers in Georgia to operate her website; that she has never transacted business in New York; that she has not contracted to supply goods or services in New York; that the content of her website is not directed towards New York; that she does not regularly conduct business in New York nor solicit business in New York; that she does not derive

substantial revenue from New York; that she has not visited New York in 22 years; and that she does not know where plaintiff resides.

In opposition to the instant motion, plaintiff states that Rose's website includes hyperlinks for products that target persons in New York, such as a hyperlink for "Lexus" dealerships located in, and serving persons in, New York. Further, according to plaintiff's counsel, in order to advertise on Rose's website, potential advertisers are directed to an icon that leads to her advertising agency, Gorilla Nation, which has offices in New York City. Therefore, plaintiff concludes that Rose derives advertising revenue from business conducted in New York and is subject to the jurisdiction of the New York courts.

In reply, Rose maintains that she does not solicit any business from New York, and that her two advertising services are Gorilla Nation and Google. Rose avers that, whereas Gorilla Nation operates an office in New York, she conducts her business with that entity through its California office, and conducts her business with Google by means of its internet from Georgia. In addition, Rose contends that the advertisements mentioned in plaintiff's opposition are not ones that she solicited, that Google places ads on websites based on the content of the page that is being viewed (Reply, Ex. A), and that Rose never knows which ads Google is going to place on her website. Lastly, Rose claims that plaintiff has

failed to present any evidence to support his allegation that she is subject to the jurisdiction of the New York courts based on New York's long-arm statute.

DISCUSSION

CPLR 3211 (a), "Motion to dismiss cause of action," states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence; or

(5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

(7) the pleading fails to state a cause of action; or

(8) the court has not jurisdiction of the person of the defendant;"

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory. *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188 (1st Dept 1999). Further, the movant has the burden of demonstrating that, based upon the four corners of the complaint liberally construed in favor of the plaintiff, the pleading states no legally cognizable cause of action. *Guggenheimer v Ginzburg*, 43 NY2d 268 (1977); *Salles v Chase Manhattan Bank*, 300 AD2d 226 (1st Dept 2002).

Rose's motion to dismiss the complaint based on lack of personal jurisdiction is granted.

An out-of-state resident cannot be subject to personal jurisdiction in New York unless the plaintiff can prove that New York's long-arm statute confers jurisdiction over such out-of-state defendant by reason of that individual's contacts within the State, and the burden of proof rests with the plaintiff. See *Copp v Ramirez*, 62 AD3d 23 (1st Dept 2009).

New York's long-arm jurisdiction is governed by CPLR 302, which provides, in relevant part, that New York has jurisdiction over a non-domiciliary who:

1. transacts any business within the state or contracts anywhere to supply goods or services in the state; or
2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
3. commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
 - (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state; or
 - (ii) expects or should reasonably expect the act to have consequences in the state, and derives substantial revenue from interstate or international commerce; or
4. owns, uses or possesses any real property situated within the state."

Defamation actions are expressly exempted from this section of the CPLR. See *Ehrenfeld v Bin Mahfouz*, 9 NY3d 501 (2007). Furthermore, New York courts have consistently held that the posting of allegedly defamatory material outside of New York on a website that is merely accessible in New York is insufficient to

provide a basis for jurisdiction over a non-domiciliary for the purposes of CPLR 302 (a) (1). *SPCA of Upstate New York, Inc. v American Working Collie Association*, 18 NY3d 400 (2012); *Deer Consumer Products, Inc. v Little*, 35 Misc 3d 374 (Sup Ct, NY County 2012); *Gary Null & Associates, Inc. v Phillips*, 29 Misc 3d 245, 2010 WL 2754080 (Sup Ct, NY County 2010); *Henderson v Phillips*, 2010 NY Misc LEXIS 3019, 2010 NY Slip Op 31654U (Sup Ct, NY County 2010).

In opposition to Rose's jurisdictional argument, plaintiff has cited only one judicial decision, which does not support his contention that Rose is subject to New York's jurisdiction.

In *Telebyte, Inc. v Kendaco, Inc.* (105 F Supp 2d 131, 134 [ED NY 2000]), the Court stated:

"The existence of a web site outside New York, even one that offers a product for sale, cannot alone confer jurisdiction over the defendant under CPLR 302 (a) (2). Although it is in the very nature of the Internet that the allegedly [defamatory remarks] contained in these web sites can be viewed anywhere, this does not mean that the [act] occurred everywhere. Courts have held that, when web sites display [allegedly defamatory remarks], the tort is committed where the web site is created and/or maintained [internal quotation marks and citations omitted]."

Therefore, the case relied upon by plaintiff only serves to support Rose's contention that New York lacks personal jurisdiction over her. See also *Enderby v Secrets Maroma Beach Riviera Cancun & AM Resorts, LLC*, 2011 WL 6010224, 2011 US Dist LEXIS 138223 (ED NY 2011).

In addition to the foregoing, pursuant to the terms of the federal Communications Decency Act (47 USC § 230), internet service providers, such as Rose, are immune from defamation suits resulting from the exercise of their traditional editorial functions, such as deciding whether to publish a particular item. *Shiamili v The Real Estate Group of New York, Inc.*, 17 NY3d 281 (2011).

Even disregarding personal jurisdiction over Rose founded on the defamation claim, plaintiff has failed to adduce any evidence that Rose conducted purposeful activities within New York, thereby invoking the benefits and protections of New York law, so as create a substantial relationship between Rose's activities in Georgia and the cause of action asserted so as to make her subject to this court's jurisdiction. *Rashada v The New York Post*, 2011 WL 3681811, 2011 NY Misc LEXIS 4079, 2011 NY Slip Op 32234(U) (Sup Ct, NY County 2011). Movant's alternative reliefs sought, is denied, as moot.

Accordingly, it is

ORDERED that defendant Sandra Rose a/k/a Sandra Rose Hendricks' motion to dismiss the complaint asserted as against her is granted and the complaint is severed and dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

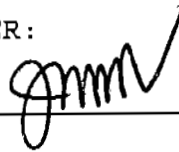
ORDERED that the Clerk is directed to enter judgment

accordingly; and it is further

ORDERED that the remainder of this action shall continue and all remaining parties are to appear for a preliminary conference on June 28, 2012 at 9:30 a.m. in Room 304 located at 71 Thomas Street, NYC 10013.

Dated: May 15, 2012

ENTER:



FILED

MAY 22 2012

Joan M. Kenney, J.S.C.

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