

Stilwell v Leahy

2014 NY Slip Op 33076(U)

September 30, 2014

Supreme Court, Putnam County

Docket Number: 986/12

Judge: Lewis J. Lubell

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To commence the 30 day 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

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

-----X
JOSEPH STILWELL,

Plaintiff,

-against -

BETTE FRANK LEAHY a/k/a DEFENSE AGAINST
EVIL a/k/a ESOTERIC FREEDOM a/k/a HENRY
W. a/k/a ROBIN HOOD; KIMBERLY CIRELLO
a/k/a GREATERGOOD2011 a/k/a ANONYMOUS;
AJAX; FOLLOW THE MONEY, PT.4; CANDYMAN
and "JOHN DOE #1" through "JOHN DOE #25",
the last twenty five names being
fictitious and unknown to plaintiff,
being persons who have made anonymous
defamatory and/or unauthorized statements
regarding plaintiff on the internet,

Defendants.

-----X
LUBELL, J.

DECISION & ORDER

Index No. 986/12

Sequence No. 7 & 8
Motion Date: 7/21/14

The following papers were considered in connection with **Motion Sequence #7** by plaintiff for an Order: (a) issuing a declaratory judgment pursuant to CPLR 3001, declaring that the Supreme Court, Putnam County has personal jurisdiction over defendant, Bette Frank Leahy, in this action; (b) imposing an adverse inference sanction against defendant Bette Frank Leahy a/k/a Defense Against Evil a/k/a Esoteric Freedom a/k/a Henry W. a/k/a Robin Hood (the "defendant") for her willful spoliation of evidence; (c) imposing sanctions pursuant to CPLR 3126 against defendant for her willful failure to provide complete disclosure as follows: (i) directing all issues relating to this Court's jurisdiction over defendant be deemed *resolved* in accordance with the claims of the plaintiff, Joseph Stillwell (the "plaintiff"); and (ii) *precluding* defendant from supporting or opposing claims or defenses and from producing or introducing evidence or testimony relating to issues of the

jurisdiction of this Court over defendant; (d) directing that a default judgment pursuant to CPLR 3215(a) and/or CPLR 3126 be entered against defendant and in favor of plaintiff; (e) assessing (i) costs against defendant pursuant to 22 NYCRR 130-1.1 in the form of actual expenses reasonably incurred and reasonable attorneys' fees resulting from defendant's frivolous conduct equivalent to 100% of all plaintiff's counsel fees and expenses incurred on this motion, and (ii) sanctions against defendant to be paid in accordance with 22 NYCRR 130-1.3 to the Clerk of the Court for transmittal to the Commissioner of Taxation and Finance, which should be in a sum no less than \$10,000.00 by reason of defendant's frivolous conduct, including her wilful spoliation of evidence in this action; and **Motion Sequence #8** by defendant Leahy for an Order dismissing the within action pursuant to CPLR 3211(8) and 306-b, and for such other and further relief as may be just, proper and equitable:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION	1
MEMORANDUM OF LAW	2
EXHIBITS A-S	3 A & B
NOTICE OF CROSS MOTION/AFFIDAVIT/AFFIRMATION/EXHIBIT A	4
AFFIRMATION IN OPPOSITION AND REPLY/EXHIBITS T-U	5
REPLY AFFIRMATION	6

Plaintiff, Joseph Stilwell, a Putnam County, New York, resident and the founder and principal of the Stilwell Group, a private investment limited partnership, brings this action for defamation, including breach of duty of confidentiality, and breach of contract, arising out of alleged defamatory statements posted anonymously on internet blogs entitled "Joseph Stilwell", "Stop Sharon Gans", "The Sharon Gans Pages", "The Robert M. Klein Pages" and "Esotericfreedom Blog" wherein plaintiff is charged "with having engaged in . . . money laundering, criminal securities fraud, obstruction of justice, and investor fraud" in connection with his association with an alleged "study group" founded in part by non-parties Sharon Gans, Alex Horn and Robert Klein. What plaintiff refers to as a "study group" is referred to as "School", "Odyssey Study Group", "cult" and/or the "Sharan Gans Group" (hereinafter referred to by the Court as the "School") by defendants herein and/or in the various blogs. The alleged breach of duty of confidentiality claim is asserted in connection with alleged anonymous postings of "confidential details of plaintiff's sealed 2003 New York divorce settlement agreement."

Plaintiff alleges that, hiding behind various anonymous pseudonyms, defendant Bette Frank Leahy ("Leahy") initiated a crusade against him through the creation and operation of various blogs and/or websites containing defamatory statements about

plaintiff which are directed towards and targeted at New Yorkers, and on which Leahy solicited comments and/or information about plaintiff. Plaintiff alleges that the libelous attacks upon his reputation have injured him in his trade, business and profession.

By Decision & Order of July 30, 2013, the Court denied plaintiff's motion (Motion Sequence "5") for a default judgment against Leahy without prejudice to re-application following the Court's determination of the personal jurisdictional issue raised in Motion Sequence "6", to wit, whether plaintiff has established personal jurisdiction over Leahy, an out-of-state defendant, under CPLR 302(a)(1), New York's long-arm statute, such as to warrant the denial of Leahy's cross-motion to dismiss or, at the very least, such as to direct discovery limited to the jurisdictional issue.

Upon recognizing that the burden of proof lies with plaintiff (Urfirer v SB Builders, LLC, 95 AD3d 1616, 1617 [3d Dept 2012], People v. Frisco Mktg. of NY LLC, 93 AD3d 1352, 1353 [4th Dept 2012]; Stardust Dance Prods., Ltd. v. Cruise Groups Intl., Inc., 63 AD3d 1262, 1264) and that plaintiff need not make a prima facie showing of personal jurisdiction, but merely needs to come forward with a "sufficient start" warranting further discovery (Urfirer v. SB Builders, LLC, supra, citing Bunkoff Gen. Contrs. v. State Auto. Mut. Ins. Co., 296 AD2d 699, 700 [3d Dept 2011], quoting Peterson v. Spartan Indus., 33 NY2d 463, 467 [1974]), the Court found that plaintiff adequately demonstrated a "sufficient start" such as to warrant discovery on the issue. Upon ruling as such, the Court noted:

Among other things, plaintiff alleges that Leahy, under the guise of Defenseagainstevil and Esotericfreedom blogs, specifically targeted a New York audience with libelous comments, used these alleged interactive blogs to solicit and encourage postings by New York residents, solicited donations from New Yorkers to maintain the blogs and even demanded money from plaintiff to remove an asserted libelous posting. Furthermore, plaintiff alleges that certain libelous conduct attributed to Leahy emanated from a residence located in Queens, New York.

Therefore, the Court denied plaintiff's motion for a default judgment against Leahy, without prejudice to re-application following a determination of the jurisdiction issue; and, granted Leahy's motion to dismiss for want of personal jurisdiction to the extent that jurisdictional discovery was directed.

This motion follows jurisdictional discovery.

Long-arm jurisdiction can be premised on the commission of a tortious act – perpetrated either within the state or outside the state, causing injury within the state – but provides an express statutory exception for "cause[s] of action for defamation of character arising from the act" (CPLR 302[a][2],[3]). Although defamation claims therefore cannot form the basis for "tortious act" jurisdiction, such claims may proceed against non-domiciliaries who transact business within the state and thereby satisfy the requirements of CPLR 302(a)(1).

(SPCA of Upstate New York, Inc. v. Am. Working Collie Ass'n, 18 NY3d 400, 404 [2012]). The special treatment accorded defamation claims reflects the state's "policy of preventing disproportionate restrictions on freedom of expression" (id. at 404), except that

"[w]here purposeful transactions of business have taken place in New York, it may not be said that subjecting the defendant to this State's jurisdiction is an 'unnecessary inhibition on freedom of speech or the press'" (Legros v. Irving, 38 A.D.2d 53, 55-56, 327 N.Y.S.2d 371 [1st Dept.1971], lv. dismissed 30 N.Y.2d 653, 331 N.Y.S.2d 673, 282 N.E.2d 626 [1972], quoting Weinstein-Korn-Miller, N.Y. Civ. Prac., vol. 1, ¶ 302.11).

(SPCA of Upstate New York, Inc. v. Am. Working Collie Ass'n, supra, at 404). Thus, the Court looks to CPLR 302(a)(1).

A New York court may exercise personal jurisdiction over a nondomiciliary who, either in person or through his or her agent, "transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR 302[a][1]; see Stardust Dance Prods., Ltd. v. Cruise Groups Intl., Inc., 63 AD3d 1262, 1263-1264 [2009]). Notably, CPLR 302(a)(1) is a "single act statute" and, therefore, "proof of one transaction in New York is sufficient to invoke jurisdiction . . . so long as the defendant's activities here were purposeful

and there is a substantial relationship between the transaction and the claim asserted" (Kreutter v. McFadden Oil Corp., 71 NY2d 460, 467 [1988]; see Stardust Dance Prods., Ltd. v. Cruise Groups Intl., Inc., 63 AD3d at 1264; Farkas v. Farkas, 36 AD3d 852, 853 [2007]; Bunkoff Gen. Contrs. v. State Auto. Mut. Ins. Co., 296 AD2d 699, 700 [2002]).

(Urfirer v. SB Builders, LLC, supra at 1617-18).

New York courts do not interpret "transact[ing] business" to include mere defamatory utterances sent into the state. Although section 302(a)(1) does not exclude defamation from its coverage, New York courts construe "transacts any business within the state" more narrowly in defamation cases than they do in the context of other sorts of litigation. In other cases, "proof of one transaction," or a "single act," "in New York is sufficient to invoke [long-arm] jurisdiction, even though the defendant never enters New York," Deutsche Bank, 7 N.Y.3d [65] at 71, 850 N.E.2d at 1142, 818 N.Y.S.2d at 166-67 (internal quotation marks omitted) . . . In defamation cases, by contrast, the "single act" of uttering a defamation, no matter how loudly, is not a "transact[ion of] business" that may provide the foundation for personal jurisdiction. In other words, when the defamatory publication itself constitutes the alleged "transact[ion of] business" for the purposes of section 302(a)(1), more than the distribution of a libelous statement must be made within the state to establish long-arm jurisdiction over the person distributing it.

(Best Van Lines, Inc. v Walker, 490 F3d 239, 248 [2d Cir 2007]). Thus, ". . . the posting of defamatory material on a website accessible in New York does not, without more, constitute 'transact[ing] business' in New York for the purposes of New York's long-arm statute [citations omitted]" (id. at 250-51). In the end, the proper inquiry is ". . . whether the defendant, through the website, 'purposefully avail[ed] himself of the privilege of conducting activities within New York, thus invoking the benefits and protections of its laws'" (id. at 252 quoting CutCo Indus. v.

Naughton, 806 F.2d 361, 365 [2d Cir.1986]).

The exercise of personal jurisdiction over a defendant must be both authorized by the CPLR and in accordance with "traditional notions of fair play and substantial justice" required by the Due Process Clause of the United States Constitution (International Shoe Co. v. State of Washington, 326 U.S. 310, 316 [1945]). A court must view the jurisdictional allegations in a light most favorable to the plaintiff and resolve all doubts in its favor (see Sokoloff v. Harriman Estates Dev. Corp., 96 N.Y.2d 409, 414 [2001]).

(Sino Clean Energy Inc. v Little, 35 Misc 3d 1226(A) [Sup Ct 2012]).

Now, post-jurisdictional discovery and upon application of the aforementioned case law, the Court finds that plaintiff has met his burden of establishing personal jurisdiction over defendant Leahy.

Upon examination of, among other things, defendant Leahy's Affidavit in Support of Cross-Motion sworn to June 20, 2014, (the "Affidavit"), her deposition testimony of October 25, 2013, the February 20, 2014 deposition testimony of non-party Charles Ward, a New York domiciliary, and the various exhibits annexed to the submitted papers including various website and blog printouts, plaintiff has established personal jurisdiction over defendant Leahy, although a Massachusetts resident and domiciliary.

Among other things, defendant Leahy created and operated several related interactive websites and blogs (sometimes collectively referred to as "Websites") which directly or indirectly (through associated hyperlinks) expressly targeted New York (and Massachusetts) residents. These Websites provided a forum for the posting of and the discussion and exchange of information about, among other things, the School, its founders and members, including plaintiff. Under the heading "About This Website", esotericfreedom.com, the following is provided:

This is a web site by and for current students and ex-students of Sharon Gans, Alex Horn and Robert Klein. What is written here is about our own personal experiences . . . We wanted you to have all the real facts and we wanted to let you know that we are out here, our lives are going well and we look forward to

forming new friendship[s] with you and supporting you in whatever way we can . . .

We invite you to write your own personal story relating to your experience of School and its effects on you or any part of your story that you would like to share with the rest of us and submit it to this web site to be posted. All posts are anonymous.

One blog in particular, the Esotericfreedom Blog, contained the defamatory posts about which plaintiff complains. The associated website, esotericfreedom.com, contains the following "disclaimer" at the bottom of the home page:

[T]he website is presented as a public service to the people of the New York and Boston metropolitan areas. Since this group actively recruits members in public spaces, it is in the public interest to have information about this group available for everyone to view.

Admittedly, one of the associated websites, but not esotericfreedom.com, solicited donations through PayPal, although there is no evidence before the Court that any funds were ever forwarded or collected in this regard.

It is also undisputed that Leahy provided non-party Charles Ward, a former School member and New York State resident and domiciliary, with the password and unfettered access to esotericfreedom.blogspot.com and thesharonganspages.blogspot.com., where he was permitted to and did contribute content, not just comments, through his own computer situated in the State of New York. As noted in Leahy's Affidavit, Ward gave deposition testimony that he "collaborate[d] with Ms. Leahy on matters of direction, editorial strategy and such." Leahy further indicates in her Affidavit that Ward ". . . contributed postings to [her] blogs and edited some of the content thereof."

Having ruled in plaintiff's favor on the personal jurisdictional issue, correspondingly, the Court denies Leahy's cross-motion for an Order dismissing the action for want of personal jurisdiction.

Plaintiff's motion for a default judgment against Leahy is granted, there being no questions raised as to the propriety of service of the Summons and Verified Complaint and/or the Supplemental Summons and Amended Verified Complaint upon Leahy, her default and/or the timeliness of this application. The

jurisdictional issue was the only opposition raised by Leahy to plaintiff's motion for a default judgment and that issue has been decided against her.

Finally, having ruled in favor of plaintiff and against defendant on the jurisdictional issue and the Court having granted a default judgment against Leahy, the Court denies as moot, that aspect of plaintiff's motion seeking the imposition of adverse inferences and/or sanctions and costs against Leahy for alleged willful spoliation of evidence, alleged willful failure to provide complete disclosure, and alleged frivolous conduct (22 NYCRR 130-1.1).

Based upon the foregoing, it is hereby

ORDERED, that, Leahy's cross-motion to dismiss for lack of personal jurisdiction is denied; and, it is further

ORDERED, that, plaintiff's motion for a default judgment against defendant Leahy is granted; and, it is further

ORDERED, that, to any further extent, the motion and cross-motion are denied; and, it is further

ORDERED, that plaintiff and all parties against whom this Court has granted a default judgment are directed to appear before the Court at 9:30 A.M. on November 17, 2014, for a Status/Scheduling Conference to set a date for an inquest as to damages; and, it is further

ORDERED, that, plaintiff is directed to notify all appearing and/or defaulting defendants of the Conference date herein scheduled by the last means of service authorized by the Court and, as to Leahy, by service of a copy of this Decision & Order upon her counsel.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
September 30, 2014

S/

HON. LEWIS J. LUBELL, J.S.C.

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