SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 451373/2017

DAE HYUN CHUNG,

MOTION SEQ. NO. 001

Plaintiff,

- v -

GOOGLE, INC., ABC CORPORATION, IHATEDHC, and RAYMOND YANG,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 151, 152, 153, 154, 155, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 188

were read on this motion to DISMISS.

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this defamation action, defendant Raymond Yang ("Yang") moves, pursuant to CPLR 3211(a)(5) and (7), to dismiss the complaint of plaintiff Dae Hyun Chung ("Chung"). Plaintiff opposes the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff commenced the instant action on September 2, 2014, in the Kings County Supreme Court by filing a summons and complaint naming IHATEDHC as a defendant and Google, Inc. ("Google") and ABC Corporation as nonparties. (*See* Doc. 172.) Plaintiff alleged that he was the subject of defamatory blog postings and reviews on blog websites that are owned by Google. (*Id.* at 5.) The blogs were named "IHATEDHC" and "nodaehyunchung." (*Id.*) The original postings were published in Korean. (*See id.* at 5–6.)

The original complaint included two statements that were published on the blog websites.

The first statement, which was published on July 26, 2014, stated the following:

> He is an expert at lying. He doesn't hesitate to lie to you if he can make money. There are parts of the visa procedure where you don't need a lawyer. He tries any way possible to make the procedures seem murky so that he can benefit as much as possible. When I ask him questions, he tells me that he'll answer the question later, or that I should think about this issue later. If he answers your questions in this vague way, you should definitely be suspicious. He is lying. If he tells you that he'll do something especially for you, or that a certain service is originally one price but that he'll take a cost-cut for you, it's a lie. Don't be fooled. When push comes to shove, he'll tell you that because we're late on a process, we need to send things by express so I need to pay him a thousand or two thousand dollars. A lot of the documentation and processing can be done without having to spend money on a lawyer, but Lawyer DAE HYUN CHUNG tries to earn even more money by "filing documents" that are already filed and charging a thousand or two thousand dollars for the service. He is a typical hustler.
>
> I have been so stressed by Lawyer DAE HYUN CHUNG that I made this blog so that no one becomes a victim like me.

(*Id.*) The second statement, which was published on October 12, 2012, stated:

> Ask any lawyers in New Jersey about him. They'll call him a young, money-hungry, and disrespectful lawyer. I was so shocked that I don't even know what to say. I heard that if lawyers don't keep copies of immigration documents for seven years they lose their license to practice law. Despite this, Lawyer DAE HYUN CHUNG told me that he didn't have any copies of my files and that I needed to pay him more to get new ones. He told me that he sent the originals to the Korean embassy and that he only had copies, so we needed to reapply to get new ones. I asked another lawyer about this and he told me that Lawyer DAE HYUN CHUNG was using this tactic—telling me he didn't have the files and that we needed to get new ones so that he could get more money. So I told Lawyer DAE HYUN CHUNG that I was going to ask another lawyer to renew my files for me or report him to the board of law and he gave me my original documents right away.
>
> I was so upset and shocked that I didn't know what to say. He is really trash.

(*Id.* at 6–7.)

The original complaint asserted four causes of action: (1) libel (*id.* at 7–8); (2) tortious interference with contract/prospective economic advantage (*id.* at 8); (3) intentional infliction of emotional distress (*id.* at 8–9); and (4) prima facie tort (*id.* at 9).

On February 6, 2015, plaintiff filed a first amended complaint. (Doc. 173.) Although the caption did not name Yang as a direct defendant in the action, the body of the complaint identified Yang as the person who operated the websites. (*See id.* at 2–3.) Plaintiff did not move to amend the complaint to add Yang as a defendant until August 28, 2015 (*see* Doc. 155 at 9), which was past the time to amend the complaint as of right. By order dated January 7, 2016, the Kings County Supreme Court (Baily-Schiffman, J.) granted the motion. (Doc. 179.)

On February 25, 2016, after this Court (Baily-Schiffman, J.) granted plaintiff's motion for leave to amend the complaint (Doc. 179), plaintiff filed the second amended complaint, which named both IHATEDHC and Yang as defendants. (Doc. 153.) The second amended complaint asserted three causes of action: (1) libel (*id.* at 11–12); (2) tortious interference with contract/prospective economic advantage (*id.* at 13); and (3) injunctive relief (*id.* at 13–14). The filing also included a certificate of accuracy by Korean Translation Group. (*Id.* at 15.) It also added language to the blog posts, such as:

> He is absolutely irresponsible. He pretends to be extremely friendly in the beginning until he gets paid, but once he gets paid you can't get ahold of him. All the while he pretends to be so busy. Even when you send emails, you'll see that you often get replies that are copied and pasted. He lost my documents many times, and still talks like he's in the right.
>
> Don't believe the reviews on the Internet. There are quite a few people around me who suffered losses because of attorney Dae Hyun Chung. Even when you put up reviews at HeyKorean, Korea Portal, etc., the reviews all disappear, maybe attorney Dae Hyun Chung gives money to the websites. It's all a lie. There are quite a

> few people around me who boil over with anger when attorney Dae Hyun Chung's name is mentioned.

(*Id.* at 6.)

By order dated April 20, 2017, this Court (Freed, J.) granted a change of venue from Kings County to New York County Supreme Court.[1]

Yang now moves, pre-answer, to dismiss the second amended complaint pursuant to CPLR 3211(a)(5) and (7). In support of his motion, he argues that the second amended complaint is time-barred by the statute of limitations. (Doc. 155 at 7–10.) With respect to the cause of action for libel, although the blog posts were published in 2014, Yang was not named as a defendant in this action until the second amended complaint was filed in February of 2016. Thus, Yang argues that the action falls outside of the one-year statute of limitations for libel. (*Id.* at 7–8.) He also asserts that plaintiff should not benefit from the relation back doctrine, whereby a claim asserted against a new defendant in an action is allowed to relate back to the date when the claim was filed against an original defendant. (*Id.* at 8–9.) Yang submits a letter dated November 3, 2014, that was sent to him by plaintiff's counsel. (Doc. 154.) Because plaintiff knew of Yang's identity in November of 2014 but did not move to include him in the action until February of 2016, Yang maintains that plaintiff's libel claim is time-barred. (Doc. 155 at 9–10.) He also argues that the causes of action for tortious interference with contract and prospective economic advantage should be time-barred, since they are actually "disguised" claims for defamation. (*Id.* at 10–11.)

In the alternative, Yang argues that the complaint should be dismissed because it fails to state a cause of action. (*Id.* at 11–18.) With respect to the libel allegations, he maintains that the certification of accuracy was not notarized and is therefore an insufficient affidavit of translation from Korean to English. (*Id.* at 11–13.) Moreover, because the blog postings expressed Yang's

[1] This order can be found online on NYSCEF as Document 51 under Index Number 156345/2016, *Chung v Google.*

opinions, he argues that they are nonactionable. (*Id.* at 13–17.) Yang maintains that plaintiff failed to plead any of the elements necessary to maintain a claim for tortious interference with contract, and that plaintiff's cause of action for tortious interference with prospective economic relations must also be dismissed as it is premised on the same allegations set forth in his defamation claim. (*Id.* at 18.)

In opposition, plaintiff contends that defendants Yang and IHATEDHC are one and the same. (Doc. 171 at 9.) When Google disclosed to plaintiff the identity of the person operating the blog websites, plaintiff's counsel sent the November 3, 2014, letter to the e-mail accounts that were associated with the blogs. (*Id.*) In other words, plaintiff contends that service upon IHATEDHC constituted service upon Yang.[2] He also argues that he made timely efforts to identify Yang, such as by filing an order to show cause requiring Google to turn over any information identifying the individual(s) publishing the blog posts (*id.* at 13), and that he identified Yang as that individual in the body of the first amended complaint (*id.* at 14–15). Moreover, because an order by the Kings County Supreme Court (Baily-Schiffman, J.) dated January 7, 2016 (Doc. 179), granted plaintiff's motion to file a second amended complaint adding Yang as a defendant, he claims that the action is timely. (*Id.* at 15.)

Plaintiff maintains that Yang's assertion that he failed to state a claim is without merit, since it is "already the law of the case" that he has pleaded meritorious causes of action. (*Id.* at 10.) In support of this argument, he quotes from an order to show cause signed on September 5, 2014, in which Judge Baily-Schiffman stated that he had "made the requisite showing . . .

[2] Specifically, plaintiff argues that Yang was served with the summons and complaint on September 9, 2014. (Doc. 171 at 14.) He relies on an affidavit of a Google employee who states that she sent the summons and complaint to the e-mail address associated with the two blogs. (Doc. 184.) Although the affiant testifies that this was in accordance with the Court's (Baily-Schiffman, J.) order of September 5, 2014 (*id.*), plaintiff has failed to attach such order to his papers. Moreover, plaintiff has failed entirely to argue that the statutory methods of service were impracticable. (*See Wimbledon Fin. Master Fund, Ltd. v Laslop*, 169 AD3d 550, 551 [1st Dept 2019].)

concerning the existence of a meritorious cause of action . . . ." (*See* Doc. 182 at 1–2.) He further alleges that Yang was never his client (Doc. 171 at 16–17); thus, plaintiff argues that the blog statements were not Yang's mere personal opinions,[3] but rather outright lies and that they thus constitute actionable defamatory statements (*id.*). Last, plaintiff contends that the statements in the blog posts are susceptible to defamatory connotations (*id.* at 17–20) and that his failure to annex to the complaint an affidavit containing the translator's qualification did not substantially prejudice Yang (*id.* at 20–23).

LEGAL CONCLUSIONS:

On a CPLR 3211 motion to dismiss a complaint, "the pleading is to be afforded a liberal construction. [The court is to] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].)

CPLR 3211(a)(5) authorizes dismissal when, inter alia, an action is time-barred by the applicable statute of limitations.

CPLR 3211(a)(7) "test[s] the facial sufficiency of the pleading in two different ways." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) First, "the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law." (*Id.*) Second, the court may dismiss a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*Id.*)

[3] Plaintiff correctly points out that Yang's motion papers do not include an affidavit by someone with personal knowledge. (Doc. 171 at 23.) Therefore, plaintiff also argues that the motion should be denied on that basis, since the moving papers cannot establish—absent an affidavit executed by Yang—that the blog posts expressed Yang's personal opinions toward plaintiff. (*See id.*)

a. Whether the Second Amended Complaint is Time-Barred by the Statute of Limitations.

A cause of action for defamation is governed by a one-year statute of limitations. (*See* CPLR 215[3].) The limitations period begins on the "date of actual distribution" of the defamatory material. (*Sorge v Parade Publs., Inc.*, 20 AD2d 338, 343 [1st Dept 1964].)

The instant action was commenced on September 2, 2014, in the Kings County Supreme Court. (Doc. 172.) Because the blog statements complained of were published online earlier in 2014 (*see id.* at 5–7), the original complaint was timely. However, that complaint named only IHATEDHC as a defendant. (*See* Doc. 172.) In fact, by order dated April 20, 2017, this Court (Freed, J.) previously determined that "the first pleading which plaintiff . . . served on defendant Yang . . . was the second amended complaint. The second amended complaint [was] served on defendant Yang on July 8, 2016 . . . ."[4] Thus, plaintiff's argument that service upon IHATEDHC in September of 2014 (Doc. 171 at 10–11) also constituted service upon Yang is contrary to a prior finding by this Court.

Because service of the second amended complaint occurred in 2016 and was therefore over a year after the published online statements in 2014, this Court must next determine whether the relation back doctrine applies. This Court concludes that it does not. The Court of Appeals, in *Buran v Coupal*, 87 NY2d 173 at 178 (1995), elucidated a three-part test for when claims asserted against a new defendant may relate back to an earlier pleading against another defendant. Causes of action against new defendants may relate back when: "(1) both claims arose out of the same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original

[4] This order may be found online at NYSCEF as Document 51 under New York County Index Number 156345/2016, *Chung v Google*.

defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well." (*Id.*) "[A]llowing the relation back of amendments adding new defendants implicates more seriously . . . policy concerns than simply the relation back of new causes of action . . . ." (*Id.*)

Here, plaintiff's second amended complaint fails to satisfy the third requirement. In support of the motion, Yang submits a letter, dated November 3, 2014, that was sent to him by plaintiff's counsel. (Doc. 154.) The letter states:

> We write to inform you that we have learned you have posted defamatory blogs online and we are prepared to pursue legal action immediately on behalf of our client . . . . The purpose of this letter . . . is to give you the opportunity to begin a good-faith dialogue that can form the basis for a private and amicable resolution that is fair to all parties concerned.

(*Id.*) At oral argument, Yang's counsel represented that the blogs were taken down. Moreover, this letter establishes that plaintiff knew of Yang's identity in 2014 and yet procrastinated in adding him as a direct defendant until 2016. This was not an "excusable mistake" as to Yang's identity. (*See Garcia v New York-Presbyterian Hosp.*, 114 AD3d 615 [1st Dept 2014].) When plaintiff delayed for over a year in commencing the action against him, Yang could "have concluded that there was no intent to sue him . . . and that the matter ha[d] been laid to rest as far as he is concerned." (*Id.* at 616 (internal quotations omitted).)

Plaintiff's arguments to the contrary are unavailing. He contends that the action is timely as to Yang because he filed a first amended complaint naming Yang as a defendant in February of 2016, which was within the limitations period. (Doc. 171 at 14.) However, by order dated April 20, 2017, this Court (Freed, J.) previously determined that the first amended complaint was a

nullity: "[T]he purported service of the amended complaint on defendant Yang on February 6, 2015 was improper since . . . plaintiff did not seek leave to amend the complaint until August of 2015 and, in any event, an affidavit of service relating to the purposed February 2015 service [was] not filed with the court."[5] Therefore, the cause of action for libel[6] was untimely and should be dismissed.

b. Whether the Second Amended Complaint States a Cause of Action.

Even if the second amended complaint were timely, this Court nevertheless finds that it must be dismissed for failure to state a claim. As a preliminary matter, while it contains a certificate of accuracy for the translation, the second amended complaint was not, as required by CPLR 2102(b), accompanied by an affidavit of the translator who transcribed the blog posts from Korean to English.[7] (*See 501 Fifth Ave. Co. LLC v Alvona LLC*, 110 AD3d 494, 494 [1st Dept 2013] (court declined to consider an affidavit that was translated into English absent an affidavit from the translator).)

Further, this Court concludes that the blog posts constitute nonactionable opinion. When viewed in their broader context, the "statements amount to [Yang's] opinions and beliefs . . . about [Chung's] work." (*Frechtman v Gutterman*, 115 AD3d 102, 106 [1st Dept 2014] (stating that it is important to look "at the content of the whole communication, its tone and apparent purpose . . . ."); *see also Gross v New York Times Co.*, 82 NY2d 146, 152–53 [1993] ("Since falsity is a necessary element of a defamation cause of action and only 'facts' are capable of being proven

[5] This order may be found online at NYSCEF as Document 51 under New York County Index Number 156345/2016, *Chung v Google*.
[6] This Court will consider the causes of action for tortious interference with contract and prospective economic advantage in the following section.
[7] An affidavit of the translator has been submitted as NYSCEF Document 185, but this was executed in November of 2018 and therefore could not have accompanied the second amended complaint, which was filed in 2016.

false, 'it follows that only statements alleging facts can properly be the subject of a defamation action.'") (internal citations omitted).) Although Yang's statements imply that Chung is a liar, disrespectful, and a hustler, such characterizations have been held nonactionable. (*See, e.g.*, *Farber v Jefferys*, 103 AD3d 514, 516 [1st Dept 2013] (use of the word "liar" in the contested statement was not actionable).) And, while plaintiff argues that the statements are defamatory because they are "mixed" statements of opinion and fact (Doc. 171 at 17), our caselaw holds that even "apparent statements of fact may assume the character of statements of opinion . . . when made in public debate . . . or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole." (*Frechtman*, 115 AD3d at 106.) That the statements at issue expressed Yang's opinions are underscored by the fact that they were made in an online Internet forum. (*See Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 43 [1st Dept 2011] (observing that readers "give less credence" to remarks published on the Internet).) Thus, plaintiff's action for libel should be dismissed, since the alleged statements are nonactionable opinion.

Plaintiff's causes of action for tortious interference with contract and prospective economic advantage must be dismissed. The second amended complaint does not even allege the existence of a contract, which is a necessary element to sustaining a claim for tortious interference with contract. (*See Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006] (on a cause of action for tortious interference with contract, a plaintiff must allege, *inter alia*, the existence of a valid contract).)

To sustain a cause of action for tortious interference with prospective economic advantage, a "plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299–300 [1st

Dept 1999].) "'Wrongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required." (*Id.* at 300.) The only wrongful act alleged by plaintiff in the complaint is that Yang supposedly defamed him. However, as explained above, the second amended complaint failed to state a claim for defamation. (*See Phillips v Carter*, 58 AD3d 528, 528 [1st Dept 2009] (dismissing a claim for tortious interference with prospective economic advantage where, *inter alia*, plaintiff insufficiently plead a claim for defamation); *see also Entertainment Partners Group, Inc. v Davis*, 198 AD2d 63, 64 [1st Dept 1993] (holding that the plaintiff may not circumvent the one-year statute of limitations applicable to defamation actions by casting his defamation claim as one for an economic tort, such as tortious interference with business relations).) Thus, plaintiff's claim for tortious interference with prospective economic advantage must also be dismissed.

Last, plaintiff's third cause of action for injunctive relief must be dismissed, since plaintiff has not established the irreparable harm necessary to support injunctive relief. (*See Solomon v. Pepsi-Cola Co.*, 140 AD2d 323 [2d Dept 1988].)

In accordance with the foregoing, it is hereby:

ORDERED that the motion by defendant Raymond Yang to dismiss the second amended complaint of plaintiff Dae Hyun Chung is granted; and it is further

ORDERED that the second amended complaint is dismissed as against defendant Raymond Yang; and it is further

ORDERED that the action is severed and continued against the remaining defendant IHATEDHC; and it is further

ORDERED that the caption be amended to reflect the dismissal of Raymond Yang and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that, within 30 days after this order is filed with NYSCEF, counsel for the moving defendant is to serve a copy of this order, with notice of entry, on all parties and on the General Clerk's Office at 60 Centre Street, Room 119, and the Clerk is directed to note the change in the caption and to enter judgment accordingly; and it is further

ORDERED that the parties are to appear for a preliminary conference on June 18, 2019, at 2:15 PM in Room 280 at 80 Centre Street; and it is further

ORDERED that this constitutes the order and decision of this Court.

5/20/2019
DATE

KATHRYN E. FREED, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	☐ DENIED		GRANTED IN PART	☐	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT	☐	REFERENCE