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

PRESENT: Hon Joan A. Madden PART 11
Justice

Index Number : 114067/2011
KOCH, DANIEL
vs.
BLIT, MATTHEW
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

FILED
SEP 26 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: Sept 11, 2012

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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DANIEL KOCH,

Index No. 114067/11

Plaintiff,

- against -

MATTHEW BLIT, individually, and LEVINE & BLIT, PLLC,

Defendants.

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JOAN A. MADDEN, J.:

Defendants Matthew Blit ("Blit") and Levine & Blit, PLLC ("Levine & Blit") move to dismiss the complaint against them on statute of limitations grounds (CPLR 3211(a)(5)) and for failure to state a cause of action(CPLR 3211(a)(7)). Plaintiff Daniel Koch ("Koch") opposes the motion, which is granted for the reasons below.

Background

This action arises out of defendants' representation of non-party Ashley Chontos ("Chontos") in connection with an action for sexual harassment against Koch. Chontos was a waitress at Jour et Nuit from October 2007 to February 2008, under the supervision of Koch. Chontos sworn and executed an Equal Employment Opportunity Commission Charge of Discrimination ("EEOC Charge") against Jour et Nuit dated June 25, 2008, accusing Koch of discrimination based upon sexual harassment and unlawful termination. On April 2, 2010, Levine & Blit commenced an action on behalf of Chontos against Koch and her former employers based on the same allegations that were the subject of the EEOC charge (hereinafter "the Chontos Action"). The Chontos Action alleged, *inter alia*, that Chontos was subjected to unwanted and intentional sexual

harassment by Koch. The Chontos Action was dismissed by Hon. Judith J. Gishe in her decision, dated August 9, 2011, for lack of personal jurisdiction after finding that service was not properly made upon any of the named defendants.

On April 15, 2010 the New York Post published an article about the lawsuit (hereinafter "the First Article"). The First Article briefly described the nature of Chontos Action and restated the allegations in the complaint as to Koch's purported conduct, and included statements by Chontos in support of these allegations. While the First Article indicated that defendants Blit, and Levine & Blit were Chontos' attorneys, it did not include any statements by them.

On July 2, 2011 the New York Post published an article about the bankruptcy of Frederick Lesort, the owner of Jour et Nuit, and one of the defendants in the Chontos Action (hereinafter "the Second Article"). The article described the judicial proceeding against Koch and described allegations in Chontos Action regarding Koch's conduct. Like the First Article, the Second Article included statements by Chontos in support to her allegations, but did not include any statements by either Blit or any other representative of Levine & Blit about Koch.

Koch commenced this action on December 15, 2011, seeking damages for defamation based on Chontos Action, the First Article, and the Second Article. In his complaint Koch alleges that defendants filed the Chontos Action containing false and defamatory statements against Koch in an attempt to wrongfully extract money from him. Koch alleges that defendants knew that the statements in the complaint were false and for that reason they never served him with it, and failed to prosecute the action. Koch

further alleges that the defendants caused the same defamatory statements to appear in the New York Post.

Defendants now move to dismiss the complaint against them. Defendants first argue that this action is time-barred insofar as it was commenced over a year after the filing of the Chontos Action and the publication of the First Article. Defendants further argue that the statements made in the complaint filed in the Chontos Action are protected by absolute privilege against claims of defamation as they were made in connection to a judicial proceeding. Defendants also argue that the First and Second Article did not contain any statements by the defendants and, in any event, they have no liability, as the articles are fair and true reports of the judicial proceedings and are therefore protected by an absolute privilege.

Defendants also assert that contrary to the allegations in the complaint, the defendants prosecuted the Chontos' Action and made attempts to serve Koch with the complaint in that action and submit an affidavit of service to support this assertion. In addition, defendants note that the factual basis for the complaint filed in the Chontos Action was sworn to by Chontos in her complaint before the EEOC, and in an affidavit submitted by Chontos in the Chontos Action in support of Chontos' motion for a default judgment against Koch and other defendants named in the action.

Koch opposes the motion, arguing that the statute of limitation was tolled by the filing of the Chontos Action as the facts that gave rise to the defamation claim were in dispute. Koch further argues that he acquired a legal right to relief, and the statute of limitations began to run, when the Chontos Action was dismissed on August 9, 2011. Koch further argues that the defendants' statements are not privileged as defendants

knew when the statements were made that they were false and without merit and that the statements were made to with malice and the sole desire to defame Koch, citing. Youmans v. Smith, 153 N.Y. 214 (1897).

In reply, defendants assert that the action must be dismissed as time-barred and, in any event, all the statements attributed to them derived directly from Chontos' sworn statement in the EEOC Charge, and therefore it cannot be said that the Chontos' Action was brought for the sole purpose of defaming Koch.

Discussion

A cause of action for defamation is governed by a one-year statute of limitations. See CPLR § 215(3). The cause of action accrues, and the one-year statute of limitation begins to run, on the date the statements at issue were made, and not when the plaintiff learns of them. Casa de Meadows Inc. (Cayman Is.) v. Zaman, 76 AD3d 917, 920 (1st Dept 2010). Thus, contrary to Koch's position, any legal right to relief arose, and the statute of limitations began to run at the time of the publications of the statements. Moreover, Lewiarz v. Travco Ins. Co., 82 AD3d 1464 (3d Dept 2011), on which Koch relies, is not to the contrary as it simply states that the statute of limitations does not begin to run until there is a legal right to relief and does not address when a defamation claim accrues for statute of limitations purposes. In addition, the statute of limitations for a defamation claim is tolled only if the defendants actively misled a plaintiff or prevented a plaintiff from timely bringing action. Bridgers v. Wagner, 80 AD3d 528 (1st Dept 2011) lv to appeal denied, 17 NY3d 717 (2011). Here, there are no allegations or evidence that defendants misled or prevented plaintiff from filing this action earlier, and the pendency of Chontos' Action does not provide a basis for tolling the limitations

period. See Pico Products, Inc. v. Eagle Comtronics, Inc., 96 AD2d 736 (4th Dept 1983)(finding no merit to plaintiff's argument that the defamation cause of action could not be asserted until the result of the earlier action was known, and therefore the defamation claim was untimely as the publication of the material at issue occurred more than a year before the commencement of the action).

As the statute of limitations has not been tolled, the one-year statute of limitations began to run at the time the allegedly defamatory statements were made. Here, the Chontos' Action was filed on April 2, 2010, and the First Article was published on April 15, 2011. As this action was commenced on December 15, 2011, or more than a year after these publications, the defamation claim is untimely with respect to these publications.

Next, as the defamation claim is timely asserted insofar as it is based on the Second Article, which was published on July 2, 2011, the court must examine whether Koch has stated an actionable claim for defamation based on the publication of this article. The pleading of a meritorious claim for defamation requires a showing of "[a] false statement, published without privilege or authorization to a third party, constituting fault as judged by, at minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." Dillon v. City of New York, 261 AD2d 34 (1st Dept 1999).

Here, the Second Article, which is attached to the complaint,[1] is mainly concerned with the filling for bankruptcy by the restauranteur who owned Jour et Nuit

[1]The court notes that attaching the Second Article to the complaint is sufficient to satisfy the pleading requirement for defamation provided under CPLR 3016(a). See Polish Am. Immigration Relief Comm. v. Relax, 172 AD2d 374 (1st Dept 1991).

and was named as a defendant in the Chontos Action. The only part of the Second Article pertaining to Koch is a summary of the allegations in the complaint in the Chontos' Action, which pertain to a judicial proceeding and thus are protected by the privilege created under Civil Rights Law § 74. See Lechter v. Engel, 33 AD3d 10, 17 (1st Dept 2006)(holding that attorney's statements made to the New York Law Journal pertained to a legal malpractice action were protected by the absolute privilege provided under Civil Rights Law § 74).

Next, contrary to Koch's argument, the exception to the absolute privilege set forth in Youmans v. Smith 153 NY at 219-220, does not apply here. In that case, the Court of Appeals explained that importance of preserving the absolute privilege afforded pertinent writings and words used in the course of a judicial proceeding since "the due administration of justice requires that the rights of clients should not be imperiled by subjecting their legal advisers to the constant fear of suits for libel or slander...." Id. However, the court also noted that an exception existed to the privilege when "counsel, through an excess of zeal to serve their clients, or in order to gratify their own vindictive feelings, go beyond the bounds of reason, and by main force bring into a lawsuit matters so obviously impertinent as not to admit of discussion." Id.

Here, it cannot be said that the action, which was based on a sworn statement provided by Chontos to the EEOC, was commenced without any basis or for solely malicious purposes or that the action included statements "impertinent" to the action for sexual harassment. Thus, the absolute privilege applies to the statements in the Second Article pertaining to Koch, and the action must be dismissed. However, defendants request for sanctions and costs is denied.

In view of the above, it is

ORDERED that the motion to dismiss is granted, and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint in its entirety.

DATED: ~~August~~ September 13, 2012

J.S.C.