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 : 003
RENEWAL

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.

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

Dated: March 15, 2013

_____, 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.:

Plaintiff Daniel Koch ("Koch") moves for renewal and reargument of this court's decision and order dated September 11, 2012 ("the original decision"), which granted defendants' motion to dismiss the complaint on statute of limitations grounds and for failure to state a cause of action. Defendants Matthew Blit ("Blit") and Levine & Blit, PLLC ("Levine & Blit") oppose the motion and request that sanctions be imposed against plaintiff.

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 filed with the 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 employer 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 the 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 moved to dismiss the complaint against them, arguing that the action was 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 argued 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 argued 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 noted 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 opposed 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 argued 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 also argued 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 the original decision, the court found that the one-year statute of limitations applicable to defamation claims barred plaintiff's claims to the extent they were based on statements in the Chontos Action and the First Article since those statements were made more than a year before the action was commenced in December 2011. Moreover, the court rejected plaintiff's argument that the limitations period was tolled and dismissed the complaint as there were no allegations or evidence that defendants misled or prevented plaintiff from filing the action earlier.

Next, while the court found that the defamation claim was timely asserted insofar as it was based on the statements Second Article, the court found that plaintiff failed to state a cause of action based on these statements as they pertained to a judicial proceeding and were thus protected by the absolute privilege created under Civil Rights Law § 74.

After the court issued the original decision, plaintiff submitted a motion to amend its pleadings, which the court denied as moot.

Koch moves for renewal and reargument asserting, *inter alia*, that the court erred in rejecting his position that the statute of limitations was tolled by the Chantos lawsuit, which was not dismissed until August 2011, and that defendants' malice in bringing the Chantos lawsuit defeats the absolute privilege accorded to judicial proceedings. In addition, plaintiff asserts that the finding by Justice Gische that defendants did not properly serve the complaint in the Chantos lawsuit demonstrates that the lawsuit was frivolous and commenced with malice. As for the EEOC complaint on which the Chantos Action was allegedly based, Koch maintains that there was no evidence that it was ever filed.

In opposition, defendants argue that the motion to reargue is untimely as it was made more than thirty days after it served plaintiff with the original decision with notice of entry. Moreover, defendants argue there is no basis for granting renewal or reargument and that plaintiff should be sanctioned for frivolous motion practice. In addition, defendants provide evidence the EEOC complaint at issue was filed by Chantos, including a letter from the EEOC acknowledging the receipt of the complaint, and a copy of the complaint stamped received by the EEOC.

Discussion

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992). Under CPLR 2221 (d)(3) a motion to reargue is to be made "within thirty days after service of the order determining the motion and written notice of it entry."[1]

Here, the motion to reargue is untimely as it was not made within 30 days of service of the order with notice of entry. In particular, defendants submit proof that they served original decision notice of entry on October 15, 2012, while this motion was not made until it was it was not served on November 20, 2012, which is past the 30-day deadline. See Greenfield v. Philles

[1]The thirty-day limit is based on the time allotted for taking an appeal as a matter of right since, like an appeal, a motion to reargue challenges the legal basis of the underlying decision and order. See, McKinney's Consol. Laws of NY, Book 7B; C2221:8, at 183. As is the rule with an appeal, either party can start the thirty-day period running by service of the order with notice of entry. See Siegel, New York Practice, § 533, at 880.

Records, 160 AD2d 458 (1st Dept 1990)("a motion on notice is made when a notice of motion or an order to show cause is served"). Plaintiff argues that the motion should be deemed timely as defendants failed to serve him with a complete copy and that difficulties arising from Hurricane Sandy and the Veteran's Day holiday. However, plaintiff fails to detail the basis for such difficulties and his blanket statement is insufficient to provide support for such relief.

In any event, there is no basis for granting reargument as the court did not misapprehend any relevant facts or misapply the law. To the contrary, as found in the original decision plaintiff's cause of action for defamation accrued, and the one-year statute of limitation begins to run, on the date the statements at issue were made, and not when plaintiff learned of them. Casa de Meadows Inc. (Cayman Is.) v. Zaman, 76 AD3d 917, 920 (1st Dept 2010). Nor is plaintiff's argument that the statute of limitations was tolled due to the Chantos action supported by law. Moreover, the court correctly found that the absolute privilege applied to the statements in the Second Article regarding the Chantos action, and that there was no basis for finding that an exception based on defendants' purported malice.

There is also no basis for granting renewal. "A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore not brought to the court's attention." Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted).[2] Here, defendants point to no facts that were not

[2]Unlike a motion to reargue, a motion to renew does not have a statutory time limit. See Tishman Const. Corp. of New York v. City of New York, 280 AD2d 374 (1st Dept 2001); Harrell v. Koppers Co. Inc., 154 AD2d 340 (2d Dept 1989); West's McKinney's Forms Civil Practice Law and Rules, § 5:49 ("no time limits, except for laches applies to a motion to renew").

identified in the prior motion that would serve as a basis for granting renewal. Moreover, Koch's position that the EEOC complaint was not filed is refuted by evidence to the contrary submitted by defendants in opposition to the motion.

Defendants request for sanctions and costs is denied.

In view of the above, it is

ORDERED that plaintiff's motion for renewal and reargument is denied.

DATED: March 15 2013

J.S.C.