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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice

PART 46

Index Number : 108971/2011
CASSINI, MARIANNE NESTOR
vs.
ADVANCE PUBLICATIONS, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

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

The following papers, numbered 1 to 3, were read on this motion to/for dismiss the action

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). 3

Upon the foregoing papers, it is ordered ~~that this motion is~~ and adjudged that:

The court grants defendants' motion to dismiss this action and denies plaintiff's cross-motion to extend her time to serve defendants, pursuant to the accompanying decision. C.P.L.R. §§ 306-b, 3211(a)(7).

FILED
APR 19 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/14/13

Lucy Billings, J.S.C.
LUCY BILLINGS
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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MARIANNE NESTOR CASSINI,

Plaintiff

- against -

ADVANCE PUBLICATIONS, INC., ADVANCE MAGAZINE PUBLISHERS, INC. D/B/A CONDE NAST PUBLICATIONS, and MAUREEN ORTH,

Defendants

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Index No. 108971/2011

DECISION AND ORDER

APPEARANCES:

For Plaintiff
Christopher Kelly Esq.
Reppert Kelly, LLC
570 Lexington Avenue, New York, NY 10022

For Defendants
Elizabeth A. McNamara Esq.
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1633 Braodway, New York, NY 10019

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendants to recover damages for libel and infliction of emotional distress based on an article published by defendants in the September 2010 issue of the well known magazine Vanity Fair, revealing plaintiff's relationship with her deceased husband, fashion designer Oleg Cassini. Defendants move to dismiss plaintiff's complaint on the grounds that plaintiff failed to serve it timely; her claims are time barred; the complaint, even as amended, fails to state a claim; and she failed to obtain personal jurisdiction over defendants by her

untimely service. C.P.L.R. §§ 306-b, 3211(a)(5), (7), and (8). Plaintiff cross-moves to extend the time to serve defendants. C.P.L.R. § 306-b. For the reasons explained below, the court grants defendants' motion and denies plaintiff's cross-motion.

II. DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Plaintiff served an amended complaint with her motion to extend time to serve the summons and complaint. Since defendants never answered plaintiff's original complaint, her time to amend her complaint has not expired. C.P.L.R. § 3025(a). Therefore the court considers defendants' motion to dismiss this action based on its failure to state a claim as addressed to the claims for libel and infliction of emotional distress pleaded in the amended complaint.

A. Libel

Libel is an injury to a person's reputation through a written publication. See Gross v. New York Times Co., 82 N.Y.2d 146, 156 (1993). To recover for libel, plaintiff must establish that defendants made (1) an unprivileged statement of fact, Shulman v. Hunderfund, 12 N.Y.3d 143, 146-47 (2009); Steinhilber v. Alphonse, 68 N.Y.2d 283, 289-90 (1986); St. David's School v. Hume, 101 A.D.3d 582, 583 (1st Dep't 2012); Sprewell v. NYP Holdings, Inc., 43 A.D.3d 16, 21 (1st Dep't 2007), (2) concerning plaintiff, Smith v. Catsimatidis, 95 A.D.3d 737 (1st Dep't 2012); Prince v. Fox Tel. Stas., Inc., 93 A.D.3d 614 (1st Dep't 2012), (3) with the requisite degree of fault, (4) that is false and defamatory, Brian v. Richardson, 87 N.Y.2d 46, 51 (1995); Omansky

v. Penning, 101 A.D.3d 514, 515 (1st Dep't 2012); Amaranth LLC v. J.P. Morgan Chase & Co., 100 A.D.3d 573, 574 (1st Dep't 2012); Konrad v. Brown, 91 A.D.3d 545, 546 (1st Dep't 2012), and (5) that damaged plaintiff. E.g., Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, 379 (1977); Sandals Resort Intl. Ltd. v. Google, Inc., 86 A.D.3d 32, 38 (1st Dep't 2011). The requisite fault on defendants' part may depend on the subject of their publication. Since the subject of the article was of legitimate public concern warranting public exposition, plaintiff was required to plead defendants' gross irresponsibility in investigating the accuracy of their reporting. Weiner v. Doubleday & Co., 74 N.Y.2d 586, 595-96 (1989); Sarwer v. Conde Nast Publs., 237 A.D.2d 191, 192 (1st Dep't 1997). The article was of public concern and warranted public exposition because it showed the difficulties in distributing a well known designer's estate, complicated by a little known marriage, his numerous romantic relationships, and internal family conflict. See Huggins v. Moore, 94 N.Y.2d 296, 304-305 (1999); Krauss v. Globe Intl., 251 A.D.2d 191, 193-94 (1st Dep't 1998); Lewis v. Newsday, Inc., 246 A.D.2d 434, 435 (1st Dep't 1998).

A statement is defamatory only if it (a) is false and (b) exposes plaintiff "to public contempt, ridicule, aversion or disgrace, or induce an evil opinion" of her and deprive her of "friendly intercourse in society." Dillon v. City of New York, 261 A.D.2d 34, 37-38 (1st Dep't 1999) (citations omitted). See Sandals Resort Intl. Ltd. v. Google, Inc., 86 A.D.3d at 38;

Bement v. N.Y.P. Holdings, 307 A.D.2d 86, 92 (1st Dep't 2003). Upon a motion to dismiss a complaint, the court determines statements' defamatory connotation. James v. Gannett Co., 40 N.Y.2d 415, 419 (1976); Ava v. NYP Holdings, Inc., 64 A.D.3d 407, 412 (1st Dep't 2009).

The amended complaint specifies various statements in defendants' article as defamatory. Defendants reported that plaintiff's stepdaughter, Tina, stated plaintiff laughed when Tina complained she was unhappy. Plaintiff claims defendants' report was malicious and false, but does not describe how it was malicious and false or deny that Tina made the statement. While plaintiff claims defendants failed to investigate adequately, she alleges neither that defendants inaccurately reported Tina's statement, see Weiner v. Doubleday & Co., 74 N.Y.2d at 596, nor that they knew Tina's statement was false, Hellenic Wiring Contr. Corp. v. Petracca & Sons, 307 A.D.2d 822, 823 (1st Dep't 2003), nor any other facts allowing an inference of defendants' gross irresponsibility. Ramos v. Madison Sq. Garden Corp., 257 A.D.2d 492, 493 (1st Dep't 1999). To the contrary, the complaint alleges that defendant Orth, the article's author, sought to interview plaintiff for the article, but she declined. Sprewell v. NYP Holdings, Inc., 43 A.D.3d at 21.

The article's statement that plaintiff did not "figure into the equation," Aff. of Christopher Kelly Ex. A ¶ 22, and suggestion that she was a "nobody," because she merely was available if Oleg Cassini and his mistress and editor "needed

pencils sharpened," id., are incapable of verification and thus opinion, which does not furnish a basis for a defamation claim. Mann v. Abel, 10 N.Y.3d 271, 277 (2008); Mercado v. Shustek, 309 A.D.2d 646, 647 (1st Dep't 2003). See Guererro v. Carva, 10 A.D.3d 105, 111 (1st Dep't 2004). The article discloses the source of the statement and does not suggest that it is premised on any undisclosed facts. Brian v. Richardson, 87 N.Y.2d 53-54; Shchegol v. Rabinovich, 30 A.D.3d 311 (1st Dep't 2006); Mercado v. Shustek, 309 A.D.2d at 647. See Guerrero v. Carva, 10 A.D.3d at 114. In fact, this characterization is consistent with plaintiff's public image portrayed in the article, which plaintiff does not challenge.

Plaintiff claims defendants' further characterization of her and her sisters throwing parties for wealthy older men "looking for action," Kelly Aff. Ex. A ¶¶ 19-20, was libel per se because the statements suggest she was a prostitute. In the context of the whole article, which relates to plaintiff's marriage to her renowned fashion designer husband, however, the statement does not suggest her unchaste behavior. James v. Gannett Co., 40 N.Y.2d at 420-21; Ava v. NYP Holdings, Inc., 64 A.D.3d at 413. The article's depiction of plaintiff being in the couple's house while her husband was with a mistress likewise does not connote any unchaste behavior by her or assail her morality. Ava v. NYP Holdings, Inc., 64 A.D.3d at 414. Finally, plaintiff alleges that defendants' defamation caused her to lose business opportunities. While damages are presumed for libel tending to

injure plaintiff's business or profession, Geraci v. Probst, 15 N.Y.3d 336, 344 (2010), plaintiff does not identify her business or profession, and none of the statements impugns her business performance. Golub v. Enquirer/Star Group, 89 N.Y.2d 1074, 1076 (1997). See Geraci v. Probst, 15 N.Y.3d at 345; Guerrero v. Carva, 10 A.D.3d at 113.

B. Infliction of Emotional Distress

To plead intentional infliction of emotional distress, plaintiff must show (1) that defendants engaged in extreme and outrageous conduct, (2) with intent to cause or in disregard of a substantial probability that the conduct would cause severe emotional distress, (3) a causal connection between their acts and her injury, and (4) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993); Suarez v. Bakalchuk, 66 A.D.3d 419 (1st Dep't 2009). Negligent infliction of emotional distress must be based on defendants' breach (1) of a duty owed to plaintiff (2) that unreasonably endangered her or caused her to fear for her own safety. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d 590, 591 (1st Dep't 2010); Sheila C. v. Povich, 11 A.D.3d 120, 130 (1st Dep't 2004). Extreme and outrageous conduct is also an element of negligent infliction of emotional distress. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d at 592; Lau v. S&M Enters., 72 A.D.3d 497, 498 (1st Dep't 2010); Goldstein v. Massachusetts Mut. Life Ins. Co., 60 A.D.3d 506, 508 (1st Dep't 2009); Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d 361, 362 (1st Dep't 2005). To support the element of extreme and

outrageous conduct, plaintiff must show that defendants' conduct was "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 11 N.Y.3d 15, 22-23 (2008); Howell v. New York Post Co., 81 N.Y.2d at 122; Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303 (1983); Suarez v. Bakalchuk, 66 A.D.3d 419.

Simply stated, defendants' publication of the article about plaintiff is not extreme and outrageous conduct. LoPresti v. Florio, 71 A.D.3d 574, 575 (1st Dep't 2010); Bement v. N.Y.P. Holdings, Inc., 307 A.D.2d at 92; Sarwer v. Conde Nast Publs., 237 A.D.2d at 192. Nor are plaintiff's emotional distress claims more than duplication of her libel claim. Akpinar v. Moran, 83 A.D.3d 458, 459 (1st Dep't 2011). See 164 Mulberry St. Corp. v. Columbia Univ., 4 A.D.3d 49, 58 (1st Dep't 2004).

III. PLAINTIFF'S CROSS-MOTION TO EXTEND TIME

Even if the amended complaint withstood dismissal on the merits, plaintiff has not met her burden to extend her time to serve defendants, as requested by her cross-motion. C.P.L.R. § 306-b. For plaintiff to extend her time to serve, she must show that good cause or the interests of justice dictate the extension. C.P.L.R. § 306-b; Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d 95, 104 (2001); Frank v. Garcia, 84 A.D.3d 654, 655 (1st Dep't 2011); Lippett v. Education Alliance, 14 A.D.3d 430, 431 (1st Dep't 2005); de Vries v. Metropolitan Tr. Auth., 11 A.D.3d 312, 313 (1st Dep't 2004). Good cause focusses

on plaintiff's diligence in attempting to serve defendants and her reasons for not effecting service despite that diligence. Plaintiff's diligence bears on the interests of justice, but this standard also encompasses all other circumstances bearing on the determination. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d at 104-105; Lippett v. Education Alliance, 14 A.D.3d at 431; de Vries v. Metropolitan Tr. Auth., 11 A.D.3d at 313.

Since plaintiff filed her complaint August 3, 2011, the last day for her to serve her summons and complaint was Thursday, December 1, 2011. Plaintiff served her summons and complaint Monday, December 5, 2011, two business days after the deadline and over three months after expiration of the applicable statute of limitations, which ran from the magazine article's original publication. C.P.L.R. § 215(3). The article's continuing publication online did not extend the statute of limitations. Firth v. State of New York, 98 N.Y.2d 365, 369 (2002); Haefner v. New York Media, LLC, 82 A.D.3d 481, 482 (1st Dep't 2011).

A. Good Cause

While plaintiff attempts to show diligence by pointing out that she filed a claim against defendants in the United Kingdom around the same time she filed this action, she does not explain how the simultaneous actions caused the delay in serving her complaint in the United States, where there was a deadline to meet, and when she was free to discontinue one of the actions later. Plaintiff's attorney candidly admits simply miscalculating the deadline based on his erroneous assumption

that 120 days equaled four months. Consequently, he did not even attempt service until after the deadline expired. Up against his own assumed deadline, he still did not take the safest course to effecting service, via defendants' registered agent, until after an unsuccessful attempt to serve defendants at their offices. Although the candor and contrition of plaintiff's attorney is creditable, none of the steps he took demonstrates diligence in attempting to serve defendants. Khedouri v. Equinox, 73 A.D.3d 532 (1st Dep't 2010); Johnson v. Concourse Vil., Inc., 69 A.D.3d 410 (1st Dep't 2010); Esposito v. Isaac, 68 A.D.3d 483 (1st Dep't 2009); Pecker Iron Works, Inc. v. Namasco Corp., 37 A.D.3d 367, 368 (1st Dep't 2007). See Frank v. Garcia, 84 A.D.3d 654; Sutter v. Reyes, 60 A.D.3d 448, 449 (1st Dep't 2009). Defendants were easily located and would have been easily served through the New York State Secretary of State. Johnson v. Concourse Vil., Inc., 69 A.D.3d 410. See Gilkes v. New York Wholesale Paper Corp., 89 A.D.3d 534 (1st Dep't 2011).

Nor did plaintiff exhibit any diligence by promptly moving to extend her time for service. Only by a cross-motion to defendants' motion to dismiss the complaint did she seek to remedy the untimeliness on April 18, 2012, more than four months after the 120 days expired, even according to her attorney's miscalculation. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d at 107; Johnson v. Concourse Vil., Inc., 69 A.D.3d at 411; Okoh v. Bunis, 48 A.D.3d 357 (1st Dep't 2008).

B. Interests of Justice

In determining whether interests of justice mandate an extension, the court must consider the expiration of the statute of limitations, prejudice to defendants, and the merits of plaintiff's claims, as well as her diligence, the length of her delay in service, and the promptness of her request to extend her time. Leader v. Maroney, Ponzini & Spencer, 97 N.Y.2d at 105-106; Nicodene v. Byblos Rest., Inc., 98 A.D.3d 445 (1st Dep't 2012); Henneberry v. Borstein, 91 A.D.3d 493, 496 (1st Dep't 2012); Lippett v. Education Alliance, 14 A.D.3d at 431. As set forth, plaintiff did not attempt to serve defendants until after the statute of limitations expired. See Nicodene v. Byblos Rest., Inc., 98 A.D.3d 445; Lippett v. Education Alliance, 14 A.D.3d at 431; de Vries v. Metropolitan Tr. Auth., 11 A.D.3d at 314. Although defendants claim prejudice from stale claims if the extension was granted, they fail to specify any lost rights, change of position, or expense due to their reliance on the statute of limitation's expiration. Sutter v. Reyes, 60 A.D.3d at 449. In fact, defendants concede plaintiff's communication with defendants' attorney in the United Kingdom regarding the article, strongly suggesting that defendants received notice of plaintiff's claim against them before the statute of limitations expired. See Nicodene v. Byblos Rest., Inc., 98 A.D.3d 445; Henneberry v. Borstein, 91 A.D.3d at 496; Woods v. M.B.D. Community Hous. Corp., 90 A.D.3d 430, 431 (1st Dep't 2011). In sum, defendants do not show prejudice from an extension.

Unquestionably it is in the interests of justice to decide claims on their merits. Henneberry v. Borstein, 91 A.D.3d at 497; Hernandez v. Abdul-Salaam, 93 A.D.3d 522 (1st Dep't 2012). Even if the amended complaint's weaknesses were not fatal at the pleading stage, any mere marginal merit would not weigh in plaintiff's favor in an interests of justice analysis. Khedouri v. Equinox, 73 A.D.3d at 533; Johnson v. Concourse Vil., Inc., 69 A.D.3d at 411. Therefore, despite the lack of demonstrated prejudice to defendants from an extension, all other factors militate against extending plaintiff's time to serve defendants. C.P.L.R. § 306-b.

IV. CONCLUSION

For the reasons set forth above, the court grants defendants' motion to dismiss the amended complaint based on its failure to state a claim. C.P.L.R. § 3211(a)(7). Therefore defendants' further grounds for dismissal and plaintiff's cross-motion to extend her time to serve the complaint are moot. The court denies plaintiff's cross-motion both as moot and on its merits. C.P.L.R. § 306-b. This decision constitutes the court's order and judgment of dismissal.

DATED: March 14, 2013

LUCY BILLINGS, J.S.C.