

**Wildenstein v 5H&Co, Inc.**

2013 NY Slip Op 31674(U)

July 23, 2013

Sup Ct, NY County

Docket Number: 650968/2010

Judge: Debra A. James

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PRESENT: DEBRA A. JAMES PART 59  
*Justice*

JOCELYNE WILDENSTEIN, Index No.: 650968/2010  
Plaintiff, Motion Date: 07/23/2013  
- v - Motion Seq. No.: 004

5H&CO, INC and ALEX STOJANOVIC,  
Defendants.

The following papers, numbered 1 to 3 were read on this motion to dismiss

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____	1, 2
Notice of Cross Motion/Answering Affidavits - Exhibits _____	3
Replying Affidavits - Exhibits _____	

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that the motion of plaintiff to dismiss the second counterclaim sounding in defamation interposed in the First Amended Answer with Counterclaims on the grounds of statute of limitations and failure to state the counterclaim with specificity shall be denied and the cross motion to correct paragraph 48 of the Amended Answer to allege "On March 24, 2010" in lieu of and instead of "On March 24, 2009" shall be granted on consent.

In Bulow v Women in Need, Inc, 89 AD3d 525 (1<sup>st</sup>

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SETTLE/SUBMIT ORDER/JUDG.

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

Dept 2011), the appeals court disagreed with the motion court's failure to consider the affidavits submitted by plaintiff in opposition to the defendants' motion to dismiss her allegations of defamation. Therefore, on this motion the court considers the affidavit of Vincent McDade appended to defendants' cross motion, which in pertinent part, states that on March 24, 2010, plaintiff "Wilderstein repeatedly commented on the rare and priceless...items of furniture...and stated that the property that [the storage company] was holding on behalf of 5H had been stolen from her by 5H, and that 5H had trespassed into one of her condominium units in order to steal the items". Assessing the words of that affidavit, this court finds that defendant's pleadings are adequately specific under CPLR 3016(a). Distinguishable on its facts is Glazier v Harris, 99 AD3d 403 (1<sup>st</sup> Dept 2012). In Glazier, the appellate division found that the innocuous statements attributed to a particular defendant about who he was visiting at which residence, and concerning who, to his exclusion, was caring for the resident at the time, were not actionable. In contrast, the "unmistakable import" of the statements that non party McCade attributes to plaintiff herein are that defendant engaged in the illegal conduct of stealing from plaintiff. Glazier, supra, at 404. The second counterclaim, as supplemented by McCade's affidavit, by "identifying the particular words that were said, who said them

and who heard them, when the speaker said them, and where the words were spoken", which is pleaded with the requisite particularity pursuant to CPLR 3016[a], states a cause of action for defamation. Glazier, ibid. That plaintiff spoke the words "property that Upstairs Downstairs was holding on behalf of 5H was stolen by 5H", "5H had trespassed" into one of her condominium units in order "to steal the items" and "5H had mishandled and destroyed the items...and acted criminally" state the alleged defamatory words *in haec verba*.

Finally, defendants have established that the allegation that the defamatory statements were made in 2009 constituted a scrivener's error. As corrected to allege that such statements were made in 2010, the second counterclaim of the First Amended Answer was timely brought.

Accordingly, it is

ORDERED that the motion of plaintiff to dismiss the second counterclaim of the First Amended Answer alleging defamation for lack of specificity pursuant to CPLR 3016(a) and for untimeliness pursuant to CPLR 3211(a)(5) is denied; and it is further

ORDERED that the cross motion of defendants to correct the First Amended Answer with Counterclaims as set forth in the Second Amended Answer with Counterclaims appended to the defendants' supporting papers is granted, and such Second Amended

Answer with Counterclaims is deemed served nunc pro tunc; and it is further;

ORDERED that plaintiff shall serve and file a Reply to the Second Amended Answer with Counterclaims in accordance with the Civil Practice Laws & Rules.

This is the decision and order of the court.

Dated: July 23, 2013

ENTER:

~~Debra A. James~~  
**DEBRA A. JAMES** J.S.C.