

<b>Kenan v Campuzano</b>
2013 NY Slip Op 32056(U)
August 28, 2013
Supreme Court, New York County
Docket Number: 152493/13
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Arthur F. Engoron
Justice

PART 37

SHAHAR KENAN,

Plaintiff,

INDEX NO. 152493/13
MOTION DATE 7/16/13
MOTION SEQ. NO. 001

- v -

DIANE CAMPUZANO,

Defendant.

The following papers, numbered 1 to 5, were read on this motion by defendant to dismiss this action.

Table with 2 columns: Paper Name and PAPERS NUMBERED. Rows include Moving Papers, Opposition Papers, Reply Papers, Sur-Reply Papers, and Sur-Sur-Reply Papers.

Upon the foregoing papers, the motion to dismiss is granted and this matter is dismissed in its entirety.

Plaintiff and defendant met in early 2006 through the "JDate" website. In April 2006 they met face to face for the first time, when plaintiff came to New York; thereafter residing with defendant. In August 2006 they married, and in October 2006 defendant filed a petition to sponsor plaintiff for US citizenship with US Citizenship and Immigration Services ("USCIS"). The marriage did not fair well and in the fall of 2007 came to an end. In October 2007 defendant withdrew her petition to sponsor plaintiff for US citizenship, and the two divorced shortly thereafter. In January or February 2008, plaintiff married another woman, which relationship also came to an end within a relatively short period of time. In April 2009, prior to the demise of plaintiff's second marriage, his second wife petitioned for plaintiff's US citizenship. Said petition was denied in part upon USCIS's determination that plaintiff's first marriage (to defendant) was "for the sole purpose of evading immigration laws and obtaining an immigration benefit." (Opposition Exh. D, p. 6.)

Plaintiff brought this subject action seeking redress for false statements and libel per se (Causes of Action 1 and 2) and a declaratory judgment that plaintiff and defendant "established a life together under the meaning of the law." (Moving Exh. A.) Defendant now moves to dismiss this action in its entirety on the basis that the Complaint fails to state a cause of action as against defendant, or, in the alternative, for summary judgment on the basis of the Statute of Limitations; that any communications by defendant were privileged; and that this Court lacks jurisdiction to decide plaintiff's claim for a declaratory judgment, which is also barred by issue preclusion. Plaintiff opposes, arguing that the Complaint makes out several causes of action as against defendant; that defendant did not properly plead the Statute of Limitations defense in her

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

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Answer, and, even if she did, the requisite Statute of Limitations is six years and thus this action is timely; that absolute privilege does not apply to the within controversy; and that this Court does, indeed, have jurisdiction to declare that plaintiff's and defendant's marriage was valid.

### Discussion

#### Statute of Limitations

At the outset, this Court notes that defendant included an affirmative defense of Statute of Limitations in her "Verified First Amended Answer" (Moving Exh. C), which was timely amended and served, as a matter of right, within 20 days of her "Answer" (Moving Exh. B).

As for the defense itself, this Court agrees with defendant that plaintiff's first two claims, alleging false affidavit and libel per se, are indeed disguised claims for defamation, and in violation of the one year Statute of Limitations for such claims. Plaintiff acknowledges that the libel per se claim is untimely, but argues that his "false affidavit" claim is essentially for prima facie tort and/or injurious falsehood. In order to state a claim for prima facie tort plaintiff would have had, at the very least, "to allege special damages that are specific and measurable." Bohn v 176 W. 86<sup>th</sup> St. Owners Corp., 106 AD3d 598, 599 (1<sup>st</sup> Dept 2013). Clearly plaintiff's complaint fails to do so. Moreover, even if this Court were to agree that plaintiff states a cause of action for prima facie tort, the Statute of Limitations for such a claim is only one year (Havell v Islam, 292 AD2d 210 (1<sup>st</sup> Dept. 2002)) making plaintiff's claim, brought at least four years after the alleged act or acts, untimely. Likewise, even if viewed as a claim for injurious falsehood, plaintiff's first cause of action is untimely brought. See, Ullmannglass v Oneida, Ltd., 86 AD3d 827 (3<sup>rd</sup> Dept 2011) (affirming lower court's dismissal of claim for injurious falsehood as time-barred). As regards the characterization of plaintiff's claims and the Statute of Limitations question, the Court of Appeals, in Morrison v National Broadcasting Co., 19 NY2d 453 (1967), summed up the law most succinctly. As the Morrison court stated:

Although 'the causative acts are different from those in defamation, \*\*\* the effect, that is, harm to reputation is the same.' ... unlike most torts, defamation is defined in terms of the injury, damage to reputation, and not in terms of the manner in which the injury is accomplished.

\* \* \*

[I]n enacting a one-year Statute of Limitations for "libel" and "slander," the Legislature should be understood to have established the policy that any action to recover damages for injury to reputation must be begun within that period. A contrary result might very well enable plaintiffs in libel and slander cases to circumvent the otherwise short limitations period by the simple expedient of "re-describing [the] defamation action to fit this new 'noncategory'" of intentional wrong. (*Internal citations omitted.*)

Id. at 458-459.

Pursuant to CPLR 215, the Statute of Limitations for defamation, unequivocally the basis for plaintiff's first two causes of action, is one year, and thus, defendant's motion is granted on Statute of Limitations grounds as to the first and second causes of action, and plaintiff's claims for false affidavit and libel per se are hereby dismissed.

#### Privileged Communication

Even assuming, *arguendo*, that plaintiff's claims are timely brought, defendant's motion would still be granted on the ground that the complained of writings are privileged communications. Plaintiff argues that the three statements by defendant to USCIS were not made to a judicial body but rather to an administrative one, and therefore not entitled to an absolute privilege. However, as the Court of Appeals stated in Rosenberg v Metlife, Inc., 8 NY3d 359, 365 (2007), "statements made during the course of a judicial or quasi-judicial proceeding are clearly protected by an absolute privilege 'as long as such statements are material and pertinent to the questions involved.'" (Emphasis added.) Further, the Court held that such absolute privilege "can extend to preliminary or investigative stages of the process, particularly where compelling public interests are at stake." Id., at 365. Thus, as to each of the statements made by defendant in connection with plaintiff's application for citizenship before USCIS, a quasi-judicial body, this Court finds that an absolute privilege would, and does, attach, and therefore plaintiff's first and second causes of action must be dismissed on this basis as well.

#### Jurisdiction of this Court

Lastly, defendant requests dismissal of plaintiff's third cause of action, which seeks a declaration that plaintiff and defendant "established a life together as husband and wife under the meaning of the law." Defendant argues that the instant action is a collateral attack on the Federal government's immigration decision. In opposition, plaintiff argues that the entity that rendered the denial is not actually a court, but rather an administrative agency, and thus no estoppel attaches. Plaintiff points to other instances when a court has adjudicated the status of the parties' relationship where there is an underlying controversy, such as in paternity or immigration matters. Moreover, plaintiff claims that collateral estoppel only attaches in immigration proceedings where there has been a full and fair opportunity for litigation. Plaintiff states that where, as here, the matter was not litigated before a court, but rather heard by an administrative agency, collateral estoppel does not attach and this Court may indeed proceed on plaintiff's declaratory request. However, even plaintiff admits, that in order for this Court to hear the case and issue declaratory relief there must be a genuine, not academic, dispute between the parties. In the matter at hand, no such non-academic, genuine controversy exists.

"The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation ... only when circumstances render it useful and necessary to accomplish such ends." Todd v Board of Educ., 272 AD 618, 620 (4<sup>th</sup> Dept 1947). In the matter at hand, there is no justiciable controversy. The parties do not dispute that they were legally married for a short period of time, and now are legally divorced. The cases cited by plaintiff all involved a question between the parties as to whether or not a marriage existed. For

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what purpose USCIS deems that marriage was entered into is of no concern to defendant and, seemingly, of no use to plaintiff, who admits in his Sur-Reply that he has no "viable" immigration options as he is now divorced from his second wife. Thus there is no dispute between these parties that falls within the jurisdiction of this Court and plaintiff's third cause of action is also dismissed.

Indeed, one purpose of the instant lawsuit, in addition to seeking damages (first two causes of action) or to resolve a disputed jural relation (third cause of action), seems to be to harass the first of plaintiff's two, recent, short-term spouses.

Conclusion

Based on the foregoing, defendant's motion to dismiss this action is granted in its entirety, and the clerk of the court is hereby directed to enter judgment in favor of defendant accordingly.

**Dated: August 28, 2013**

  
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**Arthur F. Engoron, J.S.C.**