SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: **J.S.C.** _____ **PART** 3
Justice

Index Number : 652533/2012
EGAN, BRIAN
vs
TELOMERASE ACTIVATION
Sequence Number : 002
AMEND

INDEX NO. 652533/2012
MOTION DATE 7/23/2013
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3 **, were read on this motion to/for** amend

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 10-21-13

Eileen Branston **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: IAS PART THREE

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BRIAN T. EGAN and ED MURRAY, individually and on behalf of all others similarly situated,

Plaintiffs,

Index No. 652533/2012
Motion Date: 7/23/2013
Motion Seq. No.: 002

-against-

TELOMERASE ACTIVATION SCIENCES, INC., and NOEL THOMAS PATTON,

Defendants.

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BRANSTEN, J.

In motion sequence number 002, Defendants Telomerase Activation Sciences, Inc. ("TA Sciences") and Noel Thomas Patton seek leave to amend their Answer to assert a counterclaim against Plaintiff Brian T. Egan for libel per se. Plaintiff Egan opposes. For the reasons that follow, Defendants' motion is granted.

I. Background

The instant litigation is a putative class action, asserting deceptive acts and practices in the marketing of TA-65, a treatment for aging. Plaintiffs purchased TA-65 and now bring deceptive practices claims on behalf of themselves and others against

Defendant TA Sciences, the company that produces TA-65, and its chairman, Defendant Patton.[1]

While Defendants interposed an Answer on October 3, 2012, they now seek leave to amend that Answer to assert a libel per se counterclaim against Plaintiff Egan. Defendants' proposed libel per se allegations stem from an email sent on March 22, 2012 by Egan to Dr. Javier Moran, an alleged business associate and potential customer of TA Sciences. *See* Affidavit of Noel Thomas Patton ("Patton Aff.") Ex. D, Counterclaim ¶ 4. In this email, Egan made several statements regarding Defendants, referencing an attempt by Patton to "blackmail" him, as well as TA Sciences' "fabrication" of a claim against him. *Id.* ¶¶ 6-10.

Egan opposes Defendants' motion to amend, arguing that the proposed libel per se claim is time-barred under CPLR 215[3], duplicates claims raised in a pending federal action, and otherwise fails to state a cause of action because the statements at issue are not susceptible to defamatory meaning. Each of these arguments will be addressed below.

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[1] The Complaint also asserted the same deceptive practices claims against Joseph Raffaele, M.D.; however, pursuant to a Stipulation of Discontinuance filed on December 10, 2012, the claims against Raffaele have been dismissed.

II. Analysis

Leave to amend a pleading should be freely granted so long as the amendment will not cause surprise or prejudice to the opposing party. *See* CPLR 3025(b); *see also Solomon Holding Corp. v. Golia*, 55 A.D.3d 507, 507 (1st Dep't 2008) (granting motion to amend absent showing of surprise or prejudice). A showing of "[p]rejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.'" *Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dep't 2007) (quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981)). "[O]n a motion for leave to amend a pleading, the movant 'need not establish the merit of its proposed new allegations, but [must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.'" *Perotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498 (1st Dep't 2011) (quoting *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010).

A. *Statute of Limitations*

Egan first argues that the proposed counterclaim is barred by CPLR 215[3]'s one-year statute of limitations. Although Egan is correct that the limitations period for a libel claim is one year, Patton and TA Sciences filed their motion for leave to assert the

counterclaim on March 19, 2013 – less than one year from the date the statements were purportedly published via email. Therefore, the counterclaim is timely.

B. *Pending Federal Litigation*

Egan next contends that the proposed counterclaim is identical to a libel claim asserted by Patton and TA Sciences against Egan in a previously-filed action, pending in the Southern District of New York. Accordingly, Egan claims that the proposed counterclaim is duplicative and merits dismissal under CPLR 3211(a)(4).

CPLR 3211(a)(4) authorizes the dismissal of an action where "there is another action pending between the same parties for the same cause of action in a court of any state or the United States." *See Whitney v. Whitney*, 57 N.Y.2d 731, 732 (1982) (noting court's "broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action."). Here, while there is a substantial identity of the parties between the proposed counterclaim and the pending federal action, the claims asserted are not the "same."

The statements alleged in the federal complaint do not arise out of the same wrong or series of wrongs alleged in the instant proposed counterclaim. The federal action, brought by Patton, TA Sciences, and Asia Biotech Corp. against Egan, asserts a libel claim, stemming from three September 2011 emails allegedly written by Egan to two TA

Sciences employees. The emails purportedly were written after Egan was terminated by TA Sciences and state that Egan was fired after disclosing a recent cancer diagnosis to Patton. Conversely, the instant proposed counterclaim alleges libel based on Egan's later March 2012 email statements to Dr. Moran related to Defendants' purported attempt to blackmail him and fabricate legal claims against him. While the two sets of claims both sound in libel, they emanate from different series of events. *See Montgomery Ward & Co. v. Othmer*, 127 A.D.2d 913, 914 (1st Dep't 1987) ("If the wrongs alleged are separate and independent they may be prosecuted separately."); *see also Thompson v. McCarthy*, 241 A.D.2d 606, 606 (3d Dep't 1997) (affirming denial of 3211(a)(4) motion where movant failed to demonstrate that parallel actions "arise out of the same actionable wrong"); *Graev v. Graev*, 219 A.D.2d 535, 535 (1st Dep't 1995) (folding that action by one spouse for divorce on one set of grounds not "same cause of action" as divorce action by other spouse on other grounds). Accordingly, Egan's attempt to bar amendment of the Answer on the grounds that the counterclaim is duplicative is denied.

C. *Whether Publication is Subject to Defamatory Meaning*

Egan further argues that the proposed counterclaim is clearly devoid of merit since the statements alleged are "not susceptible to defamatory meaning." (Egan's Opp. Br. at

4.) According to Egan, the emails merely express Egan's personal opinions and experiences with Patton and therefore do not give rise to an actionable libel claim.

While Egan disputes the nature of the statements alleged in the proposed counterclaim, such disagreement does not provide a basis for denial of the motion to amend. Defendants here "need not establish the merit of [their] proposed new allegations"; instead, they "[must] simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.'" *Perotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498 (1st Dep't 2011). Egan's casting of the statements as "personal opinions" does not render the counterclaims clearly defective.

III. Conclusion

For the foregoing reasons, Plaintiff Egan has failed to demonstrate that the proposed counterclaim is palpably insufficient or clearly devoid of merit. Moreover, Egan has made no showing of prejudice. As a result, Defendants' motion to amend is granted.

Accordingly, it is

ORDERED that Defendants Telomerase Activation Sciences, Inc. and Noel Thomas Patton's motion for leave to file an Amended Answer with Counterclaim is granted, and the Amended Answer in the proposed form annexed to the moving papers

shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that Plaintiff Brian Egan shall serve a Reply to Defendants' Counterclaim or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a compliance conference in Room 442, 60 Centre Street, on November 19, 2013, at 10 AM.

Dated: New York, New York
October 21, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.