Reich v Hale
2017 NY Slip Op 30197(U)
January 20, 2017
Supreme Court, New York County
Docket Number: 156787/16
Judge: Sherry Klein Heitler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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JONATHAN REICH,

Plaintiff,

-against-

CHARLES C. HALE, WARREN ST. JOHN, JESSICA L. SAWYER, DMEP CORPORATION d/b/a HALE GLOBAL, PLANCK, LLC d/b/a PATCH MEDIA and PATCH MEDIA CORP.,

Defendants.

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Index No. 156787/16
Motion Sequence 001

DECISION AND ORDER

SHERRY KLEIN HEITLER, J.S.C.

Defendants Charles C. Hale, Warren St. John, Jessica L. Sawyer, DMEP Corporation d/b/a Hale Global, Planck, LLC d/b/a Patch Media, and Patch Media Corp. (collectively, "Defendants") move pursuant to CPLR 3211 for an order dismissing the complaint in its entirety on the ground, among others, that plaintiff Jonathan Reich's ("Plaintiff") complaint is time barred. Defendants further move for an order sanctioning Plaintiff pursuant to 22 NYCRR §130-1.1(a). Plaintiff opposes and cross-moves for sanctions against the Defendants.

Plaintiff E-filed his complaint on August 12, 2016 ("Complaint"). It alleges that the Defendants published seven articles[1] between May 20, 2013 and December 26, 2013 on www.Patch.com which included defamatory statements about the Plaintiff to the effect that he made threatening calls to a Connecticut medical examiner, Dr. Wayne Carver, and to Connecticut State

[1] Police: Man Made Threatening Phone Calls to Connecticut Official in Farmington Valley (May 20, 2013); Police: CT Chief Medical Examiner Received Threatening Calls Referencing Newtown Shooting Probe (May 22, 2013); Police: Man Who Harassed Connecticut Officials Believed in Newtown Shooting Cover-Up (May 23, 2013); Police: Man Who Harassed Connecticut Officials Believed in Newtown Shooting Cover-Up (May 23, 2013); Suspect Made Harassing Calls Prior to Newtown-Related Incidents, Police Say (May 24, 2013); Police: CT Chief Medical Examiner Received Threatening Calls Referencing Newtown Shooting Probe (May 24, 2013); Top Stores: Man Threatens State Officials Post-Sandy Hook (December 26, 2013).

Police officer Paul Vance (¶¶11-21). The Complaint focuses on the May 23, 2013 article entitled "Man Who Harassed Connecticut Official Believed in Newtown Shooting Cover-Up", which allegedly indicates that Plaintiff contacted Officer Vance "for the purposes of harassment, regarding the Newtown incident" (¶14). The same article alleges that Plaintiff told a secretary to tell Dr. Carver that "'he has a problem and that he would keep calling,' police said. He told her he had 'proof' that Carver did not perform autopsies on the Newtown victims and that he was covering up the incident" (¶18). The article also indicates that "Jonathan Reich, 22, who was 'radical' in his Jewish beliefs, also harassed [the secretary] and her roommates on a school trip to Israel." (¶19).

The Complaint also makes reference to the December 26, 2013 article, which reads: "Avon police arrested Jonathan Reich, of New York, after he reportedly made threatening phone calls to former chief medical examiner Dr. H. Wayne Carver II, of Avon, and State Police Lt. Paul Vance about the Sandy Hook school shooting investigation." (¶21). Plaintiff denies making any threats to Dr. Carver or Officer Vance. Copies of the seven Patch.com articles were not attached to the Complaint.

The Complaint alleges four causes of action: libel per se, defamation, preliminary and permanent injunctive relief, and inciting religious discrimination in violation of New York's Human Rights Law.[2] Defendants move to dismiss all four causes of action, arguing that there is no cause of action plead against defendants Hale, St. John, and Sawyer in their individual capacities; the libel per se and defamation causes of action are time barred and in any event are not plead with enough specificity to support such claims; Plaintiff's request for injunctive relief is duplicative of its defamation claim; and the facts of this case do not fall within the scope of New York's Human Rights Law.

[2] NY Executive Law § 290, et. seq ("Human Rights Law").

Plaintiff argues that New York law permits Plaintiff to sue defendants Hale, St. John, and Sawyer in their individual capacities because they acted with malice; the libel per se and defamation causes of action are not time barred because there have been numerous links and republications during the past year which have restarted the statute of limitations period; the headlines of the articles and content referred to in the Complaint are specific enough to support a defamation action; injunctive relief is necessary to prevent future harm to the Plaintiff; and Defendants' reference to Plaintiff's alleged radical religious beliefs incited religious discrimination in violation of New York's Human Rights Law.

DISCUSSION

On a CPLR 3211 motion to dismiss the court must afford the pleadings a liberal construction, must accept the facts as alleged in the complaint as true, and must accord Plaintiff the benefit of every favorable inference. *Roni LLC v Arfa*, 18 NY3d 846, 848 (2011); *see also Leon v Martinez*, 84 NY2d 83, 88 (1994) ("We . . . determine only whether the facts as alleged fit within any cognizable legal theory"). A motion to dismiss will fail if "from [the Complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . ." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977); *see also Rovello v. Orofino Realty Co.*, 40 NY2d 633 (1976). On the other hand, while factual allegations contained in a Complaint should be accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Beattie v Brown & Wood*, 243 AD2d 395, 395 (1st Dept 1997).

Pursuant to CPLR 3211(a)(5), "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the cause of action may not be maintained because of . . . [the] statute of limitations." CPLR 215(3) provides that actions to recover for intentional torts such as "libel, slander, [and] false words causing special damages" are

bound by a one-year statute of limitations. *Arvanitakis v Lester*, 2016 NY App. Div. LEXIS 8057, *3 (2d Dept 2016) ("A cause of action alleging defamation is governed by a one-year statute of limitations, and accrues when the allegedly defamatory statements are originally uttered"); *see also Suss v New York Media, Inc.*, 69 AD3d 411, 411 (1st Dept 2010).

The Court of Appeals adopted the "single publication rule" in *Gregoire v G. P. Putnam's Sons*, 298 NY 119 (1948), holding that "the publication of a defamatory statement in a single issue of a newspaper, or a single issue of a magazine, although such publication consists of thousands of copies widely distributed, is, in legal effect, one publication which gives rise to one cause of action and that the applicable statute of limitation[s] runs from the date of that publication." *Id.* at 123. The court extended the single publication rule to internet publications in *Firth v State*, 98 NY2d 365 (2002), holding that each "hit" or viewing of an internet-based article should not be considered a new publication for statute of limitations purposes.

Assuming Plaintiff's claims accrued on December 26, 2013, the date the last of the seven alleged defamatory articles was published, Plaintiff would have had to file the Complaint no later than December 26, 2014 in order to comply with the one-year statute of limitations period. As set forth above, Plaintiff did not file the Complaint until August 13, 2016, almost three years later. Plaintiff effectively concedes that any cause of action arising out of the original publication of the seven articles is time barred, but insists the Complaint is timely because "there have been numerous links and republications of the articles on Patch's mushrooming websites across the county [sic] in the past year which has restarted the one-year statute of limitations."[3]

The *Firth* court declined to consider whether a defendant republishes a statement for statute of limitations purposes "by posting a link to it" on another website since that issue was not preserved for appellate review. *Id.* at 372. But the Court did note that "[r]epublication, retriggering

[3] Affirmation of Nick Wilder, Esq. dated November 10, 2016, ¶ 12.

the period of limitations, occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely 'a delayed circulation of the original edition.'" *Id.* at 371 (quoting *Rinaldi v Viking Penguin, Inc.*, 52 NY2d 422, 435 [1981]). Since *Firth* was decided these issues have been refined by the First Department. Now an exception to the single publication rule can be found to exist only where the following factors are present: "the subsequent publication is intended to and actually reaches a new audience," "the second publication is made on an occasion distinct from the initial one," "the republished statement has been modified in form or in content," and "the defendant has control over the decision to republish". *Hoesten v Best*, 34 AD3d 143, 150 (1st Dept 2006). The First Department has also held that "continuous access to an article posted via hyperlinks to a website is not a republication." *Martin v Daily News L.P.*, 121 AD3d 90, 103 (1st Dept 2014).

Plaintiff's Complaint does not meet these standards. In fact it does not even plead republication. In reality the Complaint alleges that there have been a number of internet-based discussions regarding Plaintiff's alleged conduct since the defamatory articles were first published ("these particular stories were put into hateful discussion about the Plaintiff over the past three years over many social media platforms and the Internet" (¶21)). This is critical since there is a difference between members of the public discussing a web-based defamatory article, which is not actionable, and a website actually republishing the defamatory article in a new format, which may be actionable. For this reason alone Plaintiff's republication theory is without merit.

In any event, a Complaint that does allege republication (rather than mere discussion) must specify to whom the alleged defamatory republications were made, through which outlet(s) they were published, and that such publications were made by the defendants or by someone under their control. *See Ullum v American Kennel Club*, 134 AD3d 416, 417 (1st Dept 2015) ("[plaintiffs'] affidavits failed to specify to whom the alleged defamatory republication was made" and plaintiffs'

argument that the defendant "republished the statement on its website . . . [was] insufficient to show that the statement reached 'a new audience'"). Plaintiff's opposition papers do none of this. As set forth above, Plaintiff has not submitted printouts of the original articles or printouts indicating where they were allegedly republished. Plaintiff does not allege any specific dates upon which they were allegedly republished, the names of the websites on which they were allegedly posted, and/or that these websites are under the Defendants' control. These omissions are fatal to Plaintiff's republication claim. It is also notable that while the Complaint alleges that the discussions about the Plaintiff took place "over the past three years", there is no specific allegation that any of these alleged discussions preceded the filing of this action by one year or less. *Goldman v Barrett*, 2016 U.S. Dist. LEXIS 145786, *29 (SDNY Aug. 24, 2016).

In light of the foregoing, Plaintiff's first and second causes of action for libel per se and defamation must be dismissed as time barred.

Plaintiff's third cause of action seeks a preliminary injunction requiring Defendants to "remove such statements from all websites under their control and issue appropriate retraction articles on all Patch website pages under their control and any distribution that would have been affected by their actions", and a permanent injunction preventing Defendants from "continuing to issue libelous and defamatory statements about the Plaintiff" (¶38).

To establish entitlement to a preliminary injunction, Plaintiff must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction. *See* CPLR 6301; *see also Doe v Axelrod*, 73 NY2d 748, 750 (1988). Here, plaintiff seeks a preliminary injunction under the same theory of liability as his time-barred libel and defamation claims, namely injury and losses to his reputation. However, the court may not permit Plaintiff to allow such a claim to proceed when it is essentially duplicative of claims that are no longer actionable. *See Morrison v National*

Broadcasting Co., 19 NY2d 453, 459 (1967) ("A contrary result might very well enable plaintiffs in libel and slander cases to circumvent the otherwise short limitations period"); *see also Goldberg v Sitomer, Sitomer & Porges*, 97 AD2d 114, 116 (1st Dept 1983) (New York law considers claims sounding in tort to be defamation claims where the "entire injury complained of by plaintiff flows from the effect on his reputation"); *Lesesne v Brimecome,* 918 F. Supp.2d 221, 224 (SDNY Jan. 11, 2013) ("courts in New York have also kept a watchful eye for claims sounding in defamation that have been disguised as other causes of action"). In any event, injunctive relief should only be afforded in "extraordinary situations where plaintiff has no adequate relief at law and such relief is necessary to avert irreparable injury." *Chicago Research & Trading v New York Futures & Exch.*, 84 AD2d 413, 416 (1st Dept 1982). Inasmuch as Plaintiff seeks relief in the form of money damages by virtue of the Complaint's first and second causes of action, a preliminary injunction is not warranted.

The standard for granting a permanent injunction is essentially the same as that for a preliminary injunction, except that Plaintiff must demonstrate actual, rather than likely, success on the merits of his claim. *Roman Catholic Archdiocese of N.Y. v Sebelius*, 987 F. Supp. 2d 232, 258 (EDNY Dec. 13, 2013); *see also Metro Sixteen Hotel, LLC v Davis*, 2016 NY Misc. LEXIS 4149, *6-7 (Sup. Ct. NY Co. Nov. 1, 2016, O'Neill-Levy, J.). As set forth above, Plaintiff cannot demonstrate actual success on the merits since the claims underlying his request for injunctive relief are time-barred. Moreover, Plaintiff's request does not pass constitutional muster since it would infringe upon Defendants' First Amendment rights. *See Nebraska Press Assn. v Stuart*, 427 US 539, 559 (1976) ("prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"). Accordingly, Plaintiff's demand for injunctive relief is dismissed.

Plaintiff's fourth cause of action alleges that the May 23, 2013 and May 24, 2013 articles provoked hatred and religious discrimination from the public against him by describing his "radical" Jewish beliefs in violation of New York's Human Rights Law (Complaint ¶¶ 42-44):

> The articles state "Woman tells police that suspect Jonathan Reich, 22, who was 'radical in his Jewish beliefs, also harassed her and her roommates on a school trip to Israel." Plaintiff has never attended a "school-sponsored trip to Israel." Defendants exhibiting great bigotry portrayed Plaintiff as a religious nut and provoked anti-semitism.
>
> As a result Plaintiff and his family members have been targeted at the home address published by the Defendants and on online websites and social media platforms, with the intent to intimidate, threaten, trespass on private property, and express anti-Semitism.
>
> The statements contained within the news articles have subjected Plaintiff to a "trial-by-media" and exposed Plaintiff to civil rights violations and discriminatory treatment within the Hartford Judicial System by State employees, targeting Plaintiff for over three (3) years. Defendants impeded Plaintiff's right to a fair jury trial by swaying the public's opinion of Plaintiff before arraignment, revealing alleged witness names, and carelessly endangering and revealing alleged witnesses.

The enactment of New York's Human Rights Law was "deemed an exercise of the police power of the state for the protection of the public welfare." Human Rights Law § 290(2). In so doing, the New York Legislature created a division in New York State's Executive Department "to eliminate and prevent discrimination in employment, in places of public accommodation, resort or amusement, in educational institutions, in public services, in housing accommodations, in commercial space and in credit transactions and to take other actions against discrimination as herein provided." *Id.* at § 290(3).[4] While the Human Rights Law is clearly broad in scope, nothing within the Complaint is actionable thereunder.

NOW v State Div. of Human Rights, 34 NY2d 416 (1974), upon which Plaintiff relies, highlights a unique exception to this rule that does not apply to the facts and circumstances of this case. In *NOW*, the National Association of Women accused the Gannett Publishing Company of

[4] There is "a private right to commence a judicial action based on a Human Rights Law violation." *Freudenthal v County of Nassau*, 99 NY2d 285, 290 (2003); see also Human Rights Law § 297(9) ("[a]ny person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages.").

violating New York's Human Rights Law by maintaining separate classified advertising columns for male and female employment. Ruling in NOW's favor, the Court of Appeals held (*id.* at 421, internal citations omitted):

> The discrimination against women permeates the salary structure with the result that jobs listed in the "female" column are more lower paying than those listed in the "male" column . . . . Such sex discrimination, of course, is prohibited by section 296 of the Executive Law and those who aid or abet such unlawful discrimination are also chargeable with an unlawful discriminatory practice. . . . In the case at bar, it is clear that Gannett may not be held culpable for directly perpetuating discrimination due to sex solely because of the manner in which it labels its want ads. Also, it is not an "employer" nor is it an "employment agency" as those terms are used and defined in section 292 of the Executive Law . . . . However, since it published its want ads under separate sex designations, we hold that it aided and abetted sex discrimination, and such aiding and abetting is condemned by subdivision 6 of section 296 of the Executive Law.

NOW was extended in *Matter of New York Times Co. v City of New York Comm. on Human Rights*, 41 NY2d 345 (1977), which dealt with the publication of advertisements that did not contain any expressions of discrimination. There, the Court held that the New York Times "may be held as an aider and abettor of discrimination only if it published advertisements that expressed discrimination". *Id.* at 351. This exception was further extended by the Fourth Department in *State Div. of Human Rights v. Binghamton Press Co.*, 67 AD2d 231 (4th Dept 1979), which held that a newspaper "aids and abets sex discrimination when the body content of a published advertisement is palpably discriminatory and the published job title clearly lacks any basis as a bona fide occupational qualification." *Id.* at 235. The court even went so far as to impose a duty upon newspapers to refrain from publishing patently discriminatory content. *Id.* at 238-239.

Now and its progeny have no bearing on the case at bar. I therefore hold that Defendants' alleged conduct does not fall within the scope of conduct prohibited by New York's Human Rights Law. Such claims are rooted in alleged injuries to his reputation by way of defamation, which the court has already held to be inactionable.

The court has considered the parties' respective requests for sanctions and finds them to be without merit.

Accordingly, it is hereby

ORDERED that Defendants' motion to dismiss is granted and the Complaint is hereby dismissed; and it is further

ORDERED that Defendants' motion for sanctions is denied; and it is further

ORDERED that Plaintiff's cross-motion for sanctions is denied.

The Clerk of the Court is directed to mark his records accordingly.

This constitutes the decision and order of the court.

ENTER:

DATED: 1.20.17

SHERRY KLEIN HEITLER, J.S.C.