Gottwald v Geragos
2017 NY Slip Op 30755(U)
April 18, 2017
Supreme Court, New York County
Docket Number: 162075/14
Judge: Robert R. Reed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 43

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LUKASZ GOTTWALD p/k/a DR. LUKE,
Plaintiff,

-against-

Index No. 162075/14
DECISION and ORDER

MARK GERAGOS and
GERAGOS & GERAGOS, A Professional Organization,
Defendants.

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Robert R. Reed, J.:

The following decision applies to motion seq. 001 and motion seq. 002.

Defendants' motions are DENIED.

Factual Background

Plaintiff Lukasz Gottwald p/k/a Dr. Luke ("Gottwald") is a California resident and Grammy-nominated record producer and songwriter. Defendant Mark Geragos ("Geragos") is a California-licensed attorney who represents many high-profile celebrity clients. Defendant Geragos & Geragos ("G&G") is a professional corporation and law firm, organized under the laws of the state of California. Geragos is the sole principal of G&G. Both defendants have offices and represent clients in multiple states across the country, including New York.

Plaintiff filed this defamation lawsuit stemming from a Twitter exchange on social media in which, according to plaintiff, Geragos insinuated that Gottwald is a "rapist." Those "tweets" appeared on both Geragos' Twitter page and G&G's website. G&G's website, evidently, features an automatic news feed of Geragos' tweets. Plaintiff was and currently is engaged in contentious litigation in New York, Missouri, Tennessee and California involving or related to a certain professional musician represented by defendants Geragos and G&G. Included among the

allegations set forth in those other legal proceedings is an assertion that plaintiff in this action has engaged in one or more instances of sexual misconduct.

Geragos submitted an answer to the complaint herein denying the allegations, and asserting defenses and privileges against the defamation claims. Both defendants now move to dismiss with prejudice, pursuant to CPLR section 3211(a)(7), for failure to state a cause of action, and, pursuant to CPLR section 327(a), for *forum non conveniens*. G&G's motion was submitted pre-answer. Plaintiff opposes both motions.

Both Geragos & G&G assert that plaintiff has failed to state a cause of action in that the allegedly defamatory statement constitutes nonactionable opinion and constitutionally protected free speech; is covered by an absolute litigation privilege as statements relevant to pending litigation between the parties, a qualified privilege as statements relevant to subjects of moral and social matters, and an entertainment privilege involving a public figure; amounts to nothing more than rhetorical hyperbole and opinion comment on a public figure involving a newsworthy event in the entertainment world; and that the complaint insufficiently pleads actual malice or reckless disregard as required for a public figure. Both defendants assert that G&G did not publish the allegedly defamatory statement (the tweets were displayed on G&G's law firm website from an automatic feed from Geragos' personal Twitter account) and that G&G does not manage, operate or exercise control over Geragos's personal Twitter account.

Regarding their argument that New York is an inconvenient forum, defendants point out that Gottwald and Geragos are California residents, while G&G is organized under the laws of California with its main office in California. Moreover, defendants assert that G&G's New York offices are under construction, with a limited number of attorneys on the premises. Additionally, defendants claim all pertinent witnesses are located in Southern California. Geragos also notes

that he is admitted to practice only in California, and that litigating in New York would prejudice his current clients, 80% of whom are in California state. Furthermore, defendants argue that California courts would be better suited to handle this claim as the parties are already involved in other litigation in that forum. Plaintiff, in opposition to defendants' inconvenient forum argument, annexes as exhibits internet print-outs, to suggest that defendants and certain alleged pertinent witnesses have residential property and offices located in New York City, such that travelling to this forum would not pose a significant burden.

Forum Non Conveniens

CPLR 327(a) codifies the doctrine of *forum non conveniens*. It states that "when the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action." (CPLR 327[a]). The movant seeking dismissal has a heavy burden of establishing "that New York is an inconvenient forum and that a substantial nexus between New York and the action is lacking" (*see Kuwaiti Eng'g Group v. Consortium of Intl. Consultants, LLC,* 50 AD3d 599, 600).

Among the factors to be considered are the burden on the New York courts, potential hardship to the defendant, the unavailability of an alternate forum, the residence of the parties, and the location of the events giving rise to the transactions at issue in the litigation (*see Islamic Republic of Iran v. Pahlavi,* 62 NY2d 474, 479, *cert. denied* 469 U.S. 1108). Other factors include the location of potential witnesses and documents and the potential applicability of foreign law (*see Shin–Etsu Chem. Co., Ltd. v. ICICI Bank Ltd.,* 9 AD3d 171, 176-177). Under

New York law, the availability of an alternative forum, though a "most important factor to be considered in ruling on a motion to dismiss, is not an absolute precondition for dismissal on forum non conveniens grounds" (*Islamic Republic of Iran, supra,* at 481). Application of the doctrine is a matter of discretion (*Mashreqbank PSC v. Ahmad Hamad Al Gosaibi & Bros. Co.*, 23 NY3d 129, 137; *Islamic Republic of Iran v. Pahlavi*, *supra*, at 478).

While California may be a preferred location for defendants, and certainly would not be an unreasonable forum for the resolution of this dispute, the nexus between New York and the allegations of the complaint is sufficient to leave plaintiff's choice of forum undisturbed. Although defendants have their primary offices in California, defendants have put themselves out as New York legal service providers. They avail themselves of New York business, have offices located in New York, and are currently engaged in other New York litigation matters. Finally, New York is a hub for media and entertainment business such that it should not be a significant or inconvenient burden for parties and potential witnesses to travel to a New York court. Accordingly, the motions to dismiss for *forum non conveniens* are denied.

Failure to State Claim

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491; *Skillgames, LLC v Brody*, 1 AD3d 247, 250, *citing McGill v Parker*, 179 AD2d 98, 105; *see also Cron v Harago Fabrics*, 91 NY2d 362, 366). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action

(*Skillgames, id., citing Guggenheimer v Ginzburg*, 43 NY2d 268, 275). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff (*Amaro*, 60 NY3d at 491). "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*Skillgames*, 1 AD3d at 250, *citing Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233). Further, to the extent a defendant seeks to dismiss the complaint based upon documentary evidence, pursuant to CPLR section 3211(a)(1), the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88).

Here, plaintiff has pleaded allegations which, if true, may state a legally cognizable cause of action against defendants. Accepting a liberal construction of these allegations, and affording such allegations every deference, plaintiff's claims of defamation are minimally adequate to satisfy the pleading requirements for such claims. The parties here should engage in appropriate discovery in resolution of the matter, particularly as it relates to the substance of the various asserted defenses, including the various assertions of privilege. In the court's view, the documentary evidence presented on the motions does not conclusively establish such defenses as a matter of law. The court makes no pre-judgment however, as to the viability of any summary judgment motion that may be submitted after the parties have engaged in due discovery. Accordingly, the motions to dismiss for failure to state a cause of action are denied.

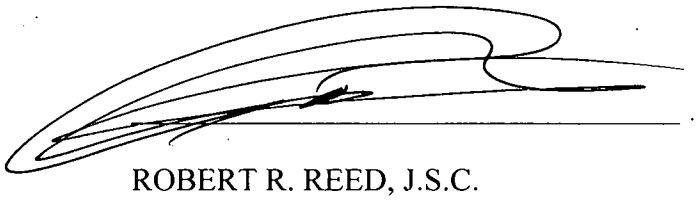
Accordingly, it is hereby:

ORDERED that defendants' motions to dismiss the complaint (seq. nos. 001 and 002 herein) are denied in their entirety; and it is further

ORDERED that defendant G&G shall e-file an answer by May 19, 2017; and it is further

ORDERED that all parties shall appear by their counsel for a preliminary conference in Part 43 of this court at 111 Centre Street, Room 581, New York, New York at 11:00 a.m. on June 8, 2017.

Dated: April 18, 2017



ROBERT R. REED, J.S.C.