

**Brummer v Wey**

2018 NY Slip Op 30212(U)

February 7, 2018

Supreme Court, New York County

Docket Number: 153583/2015

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

CHRISTOPHER BRUMMER, Plaintiff, -against-

INDEX NO. 153583/2015 MOTION DATE 01-24-18 MOTION SEQ. NO. 026 MOTION CAL. NO.

BENJAMIN WEY, FNL MEDIA LLC, and NYG CAPITAL LLC d/b/a NEW YORK GLOBAL GROUP, Defendants.

The following papers, numbered 1 to 9 were read on this motion pursuant to CPLR §3211[a],[1], [5],[7] to dismiss counterclaims and cross-motion pursuant to CPLR § 3215 and CPLR §2215 to amend counterclaims:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiff's motion pursuant to CPLR §3211[a], [1], [5] and [7] seeking to dismiss the counterclaims asserted in defendant Benjamin Wey's Verified Amended Answer, is granted.

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

Plaintiff is a professor of law at Georgetown University Law Center and was part of the National Adjudicatory Council (NAC) panel that reviewed and upheld a decision by the Financial Industry Regulatory Authority, Inc. ("FINRA")...

Plaintiff commenced this action on April 13, 2015 by filing a Summons with Notice. The Complaint, filed on April 22, 2015, asserts three causes of action: (1) for defamation, (2) defamation per se, and (3) intentional infliction of emotional distress.

On September 11, 2017 defendant Benjamin Wey filed an Answer asserting twenty-five affirmative defenses (NYSCEF Docket # 615). On October 2, 2017 defendant Benjamin Wey filed a Verified Amended Answer asserting two counter-claims for Defamation Per Se and Defamation...

In support of the counter-claims it is alleged: (1) that plaintiff defamed Benjamin Wey in the December 29, 2014 decision submitted by NAC in connection with the disciplinary

proceeding of Talman Harris and William Scholander; (2) plaintiff as part of the December 29, 2014 NAC decision published false accusations alleging Mr. Wei was involved in fraudulent securities sales as a promoter of Deer Consumer Products Inc. (hereinafter referred to as "Deer") which led the FBI and DOJ to indict and later withdraw the indictment against Mr. Wei; (3) that on December 2, 2015 plaintiff maliciously published false statements on his professional profile on the Georgetown University Law Center's website by giving the misimpression that (a) Mr. Wey was attacking the plaintiff online, and (b) when viewed together with other statements was intended to and understood by reasonable readers to mean that Mr. Wey's business associates fraudulently marketed Deer securities, and Mr. Wey was engaged in or was complicit in criminal activity; and (4) that plaintiff's online personal profile on the Georgetown University Internet page continues to deliberately publish or disseminate false and manipulative statements about Benjamin Wey.

Plaintiff seeks an Order pursuant to CPLR §3211[a], [1], [5] and [7] dismissing defendant Benjamin Wey's two counter-claims for Defamation Per Se and Defamation asserted in the Verified Amended Answer.

Defendant Benjamin Wey opposes plaintiff's motion and cross-moves pursuant to CPLR §3025[b] and CPLR §2215 to amend the Counterclaims to those stated in the proposed Second Verified Amended Answer to omit those claims related to the December 29, 2014 NAC report and only assert claims relying on statements on plaintiff's profile on the Georgetown University Law Center's website.

To the extent that defendant Benjamin Wey has conceded that he is dropping those parts of the counter-claims that rely on statements made by plaintiff in the December 29, 2014 NAC decision, there is no need to address those claims which are severed and dismissed (Memo. of Law in Opp. to Plaintiff's Mot. and in Support of Defendant's Cross-Motion, pgs. 5 (8 of 22) and 17 (20 of 22)).

A movant on a motion to dismiss a cause of action as time-barred pursuant CPLR §3211 [a], [5] bears the burden of establishing that the time to sue has expired. To meet this burden the movant is required to establish when the cause of action accrued (*Lebedev v. Blavatnik*, 144 A.D. 3d 24, 38 N.Y.S. 3d 159 [1<sup>st</sup> Dept., 2016]). A cause of action alleging defamation has a one year statute of limitations that accrues from when the allegedly defamatory statements were originally uttered (*Arvanitakis v. Lester*, 145 A.D. 3d 650, 44 N.Y.S. 3d 71 [2<sup>nd</sup> Dept., 2016] and *Hoesten v. Best*, 34 A.D. 3d 143, 821 N.Y.S. 2d 40 [2006]).

The October 2, 2017 counterclaims for defamation per se and defamation rely on comments asserted in plaintiff's profile on on December 2, 2015, more than a year after they were asserted rendering them time-barred and subject to dismissal.

CPLR §203[d] permits revival as an affirmative defense or counterclaim but its application is limited to allegations arising from the same transaction or occurrences as plaintiff's causes of action (*Carlson v. Zimmerman*, 63 A.D. 3d 772, 882 N.Y.S. 2d 139 [2<sup>nd</sup> Dept., 2009]). CPLR §203[d] permits an otherwise untimely counterclaim to be asserted as a shield for recoupment purposes, to be used solely to offset any damage award the plaintiff may obtain but does not permit the defendant to obtain affirmative relief (*California Capital Equity, LLC v. IJK, LLC* 151 A.D. 3d 650, 54 N.Y.S. 3d 578 [1<sup>st</sup> Dept., 2017] citing to *DeMille v. DeMille*, 5 A.D. 3d 428, 774 N.Y.S. 2d 156 [2<sup>nd</sup> Dept., 2004]).

The counterclaims asserted in the Verified Amended Answer rely on statements on plaintiff's profile page located on the Georgetown University Law Center's website, addressing alleged defamatory statements by Mr. Wey, about Mr. Wey's business associates and business. Plaintiff's cause of action for defamation relies on statements and altered images that appeared on an unrelated website and online digital magazine, *TheBlot*, related to the NAC panel decision supporting the FINRA lifetime ban from the security industry against non-parties William Scholander and Talman Harris. Plaintiff has shown that the counterclaims do not rely on the same transactions as asserted in the complaint and as such that they fail to state a maintainable claim pursuant to CPLR §203[d].

Defendant Benjamin Wey has not shown that the counterclaims can be maintained under the relation-back doctrine found in CPLR §203[f], because the initial answer did not assert any counterclaims (*A to Z Associates v. Cooper*, 215 A.D. 2d 161, 626 N.Y.S. 2d 143 [1<sup>st</sup> Dept. 1995]).

Plaintiff has stated grounds to dismiss the counterclaims pursuant CPLR §3211[a][1] and CPLR §3211[a][7] even if they were not time-barred.

A motion to dismiss pursuant to CPLR §3211[a][1] requires that the party seeking dismissal produce documentary evidence that utterly refutes the factual allegations or conclusively establishing a defense as a matter of law (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 2d 511, 614 N.Y.S. 2d 972 [1994]).

Plaintiff argues that documentary evidence establishes that the statements made on his profile page located on the Georgetown University Law Center's website about criminal proceedings brought against defendant Benjamin Wey, William Scholander and Talman Harris were true at the time they were posted and are an absolute defense to the counterclaims for defamation per se and defamation. In support of his contentions he provides copies of the federal indictment docket entries noting the address for defendant Benjamin Wey, William Scholander and Talman Harris, together with an SEC decision confirming the three are associates (*Morgenstern Aff. in Supp.*, Exhs. B-G and H-I).

A claim of defamation requires: "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm. Because falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense (*Stephanov v. Dow Jones & Co.*, 120 A.D. 3d 28, 987 N.Y.S. 2d 37 [1<sup>st</sup> Dept., 2014]). The publication must be given a fair reading and considered as a whole and considered in context, statements should not be considered in isolation (*Alf v. Buffalo News, Inc.*, 21 N.Y. 3d 988, 995 N.E. 2d 168, 972 N.Y.S. 2d 206 [2013]).

Defamation per se involves a statement that "suggests improper performance of one's professional duties or unprofessional conduct" (*Frechtman v. Gutterman*, 115 A.D. 3d 102, 979 N.Y.S. 2d 58 [1<sup>st</sup> Dept., 2014]). Defamation per se is also applied to statements that charge the plaintiff with a serious crime or "tends to injure another in his or her trade, business or profession" (*Geraci v. Probst*, 15 N.Y. 3d 336, 938 N.E. 2d 917, 912 N.Y.S. 2d 484 [2010]).

Defendant Benjamin Wey's argument that he is no longer subject to SEC investigation or federal criminal charges (*Cross-Mot. Fini Aff.*, Exhs. B and C), and that the failure of plaintiff to say so on the website is defamation per se and defamation, is unavailing. Publication takes place on a website at the time it is posted, and continuous access to the posted article is not republication (*Martin v. Dailey News, L.P.*, 121 A.D. 3d 90, 990 N.Y.S. 2d 473 [1<sup>st</sup> Dept. 2014]).

Dismissal of counterclaims pursuant to CPLR §3211[a][7] for failure to state a cause of action requires a determination of whether a legal or factually recognizable claim can be identified and is properly pled (*Siegmund Strauss, Inc. v. East 149<sup>th</sup> Realty Corp.*, 104 A.D. 3d 401, 960 N.Y.S. 2d 404 [1<sup>st</sup> Dept., 2013]). Pleadings that consist of bare legal conclusions and factual assertions which are clearly contradicted by documentary evidence, or are inherently lacking in credibility, will not be presumed to be true and are susceptible to dismissal (*Simkin v. Blank*, 19 N.Y. 3d 46, 968 N.E. 2d 459, 945 N.Y.S. 2d 222 [2012]).

Comments used to essentially summarize or restate the allegations contained in the pleadings filed in an action or that provide a "fair and true" report of any judicial proceeding are the type of statements that fall within Civil Rights Law §74 and are subject to privilege and an affirmative defense to defamation claims. The comments need only be "substantially accurate" in order to be deemed "fair and true." (*McRedmond v. Sutton Place Restaurant and Bar*, 48 A.D. 3d 258, 851 N.Y.S. 2d 478 [1<sup>st</sup> Dept., 2008]). "Comments that summarize or restate the allegations of a pleading filed in an action are the type of

statements that fall within the privilege of section 74"(Greenberg v. Spitzer, 155 A.D. 3d 27, 62 N.Y.S. 3d 372 [2<sup>nd</sup> Dept., 2017]).

Plaintiff has shown that that the remainder of the statements appearing on his profile page located on the Georgetown University Law Center's website amount to a "fair and true" report of judicial proceedings. Defendant Benjamin Wey's argument that the counterclaims for defamation per se and defamation should not be dismissed because the change in circumstances with the dropping of the SEC investigation and Federal charges is not "fair and true reporting," is unavailing. Plaintiff was not required to report in subsequent postings that the charges and investigation were dropped.

Pursuant to CPLR §3025 [b] grants leave to amend pleadings by leave of Court which shall be freely granted absent prejudice or surprise unless the proposed amendment is palpably insufficient or patently devoid of merit. The decision to disallow the amendment is at the Court's discretion (McCaskey, Davies & Associates, Inc. v. New York City, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983] and Y.A. v. Conair Corp., 154 A.D. 3d 611, 62 N.Y.S. 3d 116 [1<sup>st</sup> Dept., 2017]). An examination of the merits of the proposed amendment is warranted to save judicial resources. Leave to amend a pleading will be denied where the proposed pleading fails to state a cause of action, or is patently not sufficient as a matter of law (Davis & Davis, P.C. v. Morson, 286 A.D. 2d 584, 730 N.Y.S. 2d 293 [1<sup>st</sup> Dept. 2001] and Bishop v. Maurer, 83 A.D. 3d 483, 921 N.Y.S. 2d 224 [1<sup>st</sup> Dept. 2011]).

Defendant Benjamin Wey is only seeking to amend the counter-claims to remove the assertions that rely on statements made by plaintiff in the December 29, 2014 NAC decision and summarize the remaining assertions. The remaining assertions have been found to fail to state a cause of action and to be time-barred in this decision under plaintiff's motion to dismiss. The amended counterclaims fail to state a cause of action warranting denial of the CPLR §3025 relief.

CPLR §2215 applies to relief sought by cross-motion, requiring that the movant to seek relief against the party that made the original motion (Kershaw v. Hospital for Special Surgery, 114 A.D. 3d 75, 978 N.Y.S. 2d 13 [1<sup>st</sup> Dept. 2013]). The cross-motion makes no arguments in support of the CPLR §2215 relief and it is denied.

Accordingly, it is ORDERED that plaintiff's motion pursuant to CPLR §3211[a] [1], [5] and [7], seeking to dismiss the counter-claims asserted in defendant Benjamin Wey's Verified Amended Answer, is granted , and it is further,

ORDERED that the first counter-claim for defamation per se and the second counter-claim for defamation asserted in defendant Benjamin Wey's Verified Amended Answer are severed and dismissed, and it is further,

ORDERED that Defendant Benjamin Wey's motion pursuant to CPLR §3025[b] and CPLR §2215 to amend the Counterclaims in his Verified Amended Answer, is denied, and it is further,

ORDERED that plaintiff is directed to serve a copy of this Order with Notice of Entry pursuant to e-filing protocol on the defendants, the County Clerk and the Trial Support Clerk located in the General Clerk's Office who are directed to mark their records accordingly.

ENTER:

  
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MANUEL J. MENDEZ,  
J.S.C. MANUEL J. MENDEZ  
J.S.C.

Dated: February 7, 2018

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST                       REFERENCE