Dae Hyun Chung v Google, Inc.
2018 NY Slip Op 32023(U)
August 16, 2018
Supreme Court, New York County
Docket Number: 156345/16
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - PART 2

DAE HYUN CHUNG,

Plaintiff,

-against-

GOOGLE, INC. and ABC CORPORATION,

Nonparties

-against-

IHATEDHC and RAYMOND YANG,

Defendants.

DECISION/ORDER
Index No. 156345/16
Motion Sequence 002

Related Action:
Index No. 451373/17

KATHRYN E. FREED, J.S.C.

THE FOLLOWING DOCUMENTS WERE CONSIDERED IN DETERMINING THIS MOTION: NYSCEF DOCUMENT NUMBERS 64-79.

UPON THE FOREGOING PAPERS, THIS COURT'S DECISION IS AS FOLLOWS:

In this defamation action, plaintiff Dae Hyun Chung ("Chung") moves, by order to show cause, pursuant to CPLR 2221, to reargue a decision and order of this Court entered April 26, 2017 which changed the venue of this action from the Supreme Court, Kings County to the Supreme Court, New York County. Defendant Raymond Yang ("Yang") opposes the motion and cross-moves, pursuant to 22 NYCRR 130-1.1, for sanctions against Chung. After oral argument, and after a review of the motion papers and the relevant statutes and case law, the motion and cross motion are denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Chung, a New Jersey resident (Doc. 6, at par. 5)[1], commenced this defamation action against defendant alleging that the latter defamed him on a blog called www.ihatedhc.blogspot.com ("IHATEDHC"). Doc. 70. The captioned action was commenced in the Supreme Court, Kings County under Kings County Index Number 508016/14 or about September 2, 2014. Doc. 70.

By order entered September 24, 2014, the Supreme Court, Kings County (Baily-Schiffman, J.) denied defendant IHATEDHC's motion to vacate an order of the same court, entered October 6, 2014, which, inter alia, granted Chung's motion for a preliminary injunction directing defendant IHATEDHC to remove its weblogs relating to Chung and enjoining it from republishing those weblogs based on its default in appearing and opposing the motion. Kings Co. Index No. 508016/14 Doc. 47. Defendant IHATEDHC appealed the said order.

On October 20, 2014, Google Inc., named as a nonparty, produced information allowing Chung to learn Yang's identity. Doc. 47, at pars. 6-13.

An amended complaint naming IHATEDHC and Yang was filed with the Supreme Court, Kings County under Kings County Index Number 508016/14 on February 16, 2015. Kings Co. Index No. 508016/14 NYSCEF Doc. 13. Although a courtesy copy of the amended complaint was emailed to Yang's attorney on February 6, 2015 (Ex. H to Doc. 48), plaintiff, who was past the time to amend the complaint as of right (see CPLR 3025), did not move to amend the complaint to name Yang as a defendant until August 28, 2015. Kings Co. Index No. 508016/14 NYSCEF Doc. 35. The motion to amend the complaint was granted by order dated January 7, 2016. Kings Co. Index No. 508016/14 NYSCEF Doc. 120.

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[1]Unless otherwise noted, all references are to the documents filed with NYSCEF in connection with New York County Index Number 156345/16.

A second amended complaint, dated October 30, 2015 and naming IHATEDHC and Yang as defendants, was filed in Kings County on or about February 25, 2016. Kings County Index. No. 508016/14 NYSCEF Doc. No. 121. An affidavit of service filed with the Supreme Court, Kings County on April 12, 2016 reflects that the second amended complaint was served on defendant Yang by leaving the pleading with a person of suitable age and discretion on April 7, 2016 and that a follow up mailing was made to Yang the following day. Kings County Index. No. 508016/14 NYSCEF Doc. No. 122. However, an order of the Supreme Court, Kings County dated April 4, 2016 reflects that the case was dismissed "upon default of all parties." Kings County Index. No. 508016/14 NYSCEF Doc. No. 129). The case was restored to the trial calendar by order dated June 23, 2016. Kings County Index. No. 508016/14 NYSCEF Doc. No. 143.

In the second amended complaint, plaintiff, an immigration attorney, alleged that Yang, a resident of Kings County, defamed him on the IHATEDHC blog with intent to damage his reputation in the town of Fort Lee, New Jersey, which was heavily populated by Koreans, such as Chung, and which was where Chung lived. Doc. 6, at pars. 1-2, 7.[2]

Given the dismissal of the Kings County matter prior to the initial service of the second summons and complaint on Yang, the second amended complaint was re-served on Yang on July 8, 2016, after the case was restored to the trial calendar. Doc. 7; Kings County Index. No. 508016/14 NYSCEF Doc. No. 144. On July 14, 2016, Yang's attorney served plaintiff's counsel with a notice to change venue to New York County on the ground that such was the county in which Yang lived. Doc. 8. Plaintiff's counsel did not respond to the demand to change venue. Doc. 5, at par. 5.

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[2] Although the initial complaint alleged that IHATEDHC was a "resident" of Kings County (Doc. 70, at par. 6), there was no claim of what type of entity this defendant was (i.e., an individual, a corporation, a partnership). Since the amendment of the complaint to name Yang as a defendant, IHATEDHC has remained in the action as a nominal defendant.

By motion filed July 29, 2016, defendant Yang moved in this Court to change the venue of the Kings County action to New York County. Doc. 2.[3] Defendant Yang also sought a stay of his time to answer the second amended complaint. Doc. 2. In support of his motion, Yang argued that this matter should not be venued in Kings County because none of the parties to the action resided there. Rather, urged Yang, this matter should be venued in New York County, where he resided.

In support of his motion, defendant Yang submitted an affidavit in which he stated that he resided at 635 West 42nd Street, New York, New York, and had lived there since prior to the commencement of the action against IHATEDHC in September of 2014. He further asserted that he first received a copy of the complaint in this action on or about July 11, 2016.

In opposition to the motion, Chung asserted, inter alia, that, since Yang failed to make a timely motion to change venue as of right, his request to change venue was solely in this Court's discretion. In making this assertion, plaintiff maintained that Yang should have known from service on IHATEDHC that he was the intended defendant.

By order dated April 20, 2017, this Court granted Yang's motion to change venue to New York County. Doc. 51. In so holding, this Court reasoned that, in moving to change venue, Yang followed the procedure prescribed by CPLR 511(a) and (b) by filing a notice to change venue within 15 days after receiving the second amended complaint, the first pleading he received. Doc. 51. Chung filed a notice of appeal from the order on June 7, 2017 and the appeal is still pending. Doc. 67.

On or about May 15, 2017, the Kings County action, which had been pending under Kings County Index Number 508016/14, was transferred to New York County under Index Number

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[3]The Request for Judicial Intervention submitted with the motion noted that there was a related case pending under Kings County Index Number 508016/14. Doc. 3.

451373/17. NYSCEF Doc. No. 147 to New York Co. Ind. No. 451373.

On June 7, 2017, Yang moved to dismiss the complaint in the transferred action as time barred pursuant to CPLR 3211 (a) (5) and for failure to state a cause of action pursuant to CPLR 3211 (a) (7). New York County Ind. No. 451373/17 NYSCEF Doc. No. 151.

By order entered August 2, 2017, the Appellate Division, Second Department affirmed the order of Justice Baily-Schiffman entered September 24, 2015. Doc. 68. In so holding, the Second Department stated, inter alia, that, "[c]ontrary to [defendant IHATEDHC's] contention, [Chung] submitted proof that [IHATEDHC] was in fact served. Thus, there was no basis to vacate the order of October 6, 2014 pursuant to CPLR 5015(a)(4) for lack of personal jurisdiction." Doc. 68.

By order to show cause dated August 10, 2017, Chung now moves, pursuant to CPLR 2221, to reargue Yang's motion to change venue. Doc. 75. In support of the motion Chung asserts that, since Yang was properly served with the complaint on September 9, 2014, his motion to change venue, filed July 26, 2016, was untimely. Chung further asserts, in effect, that, since the second amended complaint identifies Yang and IHATEDHC as the same defendant, service on one defendant constituted service on the other. In signing the order to show cause, this Court ordered that "pending the hearing of this motion, all proceedings in this action shall be stayed in all respects." Doc. 74.[4]

In opposition to the motion, Yang argues, inter alia, that, although the Second Department's

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[4]By order dated July 13, 2017 (New York County Ind. No. 451373/17 NYSCEF Doc. No. 156), this Court set forth a briefing scheduled for the motion to dismiss, directing, inter alia, that Chung serve papers in opposition to the motion to dismiss by August 25, 2017 and that oral argument was to be conducted on September 19, 2017. Chung did not oppose the motion, which was fully submitted on December 12, 2017, because of the stay issued in conjunction with the order to show cause.

decision and order stated that "plaintiff submitted proof that the defendant was in fact served", that reference was solely to IHATEDHC. Thus, argues Yang, his time to move to change venue did not run from the date on which IHATEDHC was initially served, but began to run after the second amended complaint, dated October 30, 2015, was served. Yang also cross-moves for sanctions against Chung, asserting that the latter's motion to reargue is frivolous.

LEGAL CONCLUSIONS:

A motion for leave to reargue, pursuant to CPLR 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22 (1st Dept 1992), *lv dismissed*, 80 NY2d 1005 (1992), *rearg denied*, 81 NY2d 782 (1993). Reargument is not designed or intended to afford the unsuccessful party successive opportunities to reargue issues previously decided (*see Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]), or to present arguments different from those originally asserted. *See William P. Pahl Equip. Corp.*, 182 AD2d at 27; *Foley v Roche*, 68 AD2d 558 (1st Dept 1979); *Amato v Lord & Taylor, Inc.*, 10 AD3d 374 (2d Dept 2004). On reargument, the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked. *See Macklowe v Browning School*, 80 AD2d 790 (1st Dept 1981). Professor David Siegel succinctly instructed that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind." Siegel, NY Prac § 254, at 449 (5th ed 2011).

Yang correctly asserts that the Second Department's decision and order does not support Chung's argument that personal jurisdiction was obtained over Yang when the latter was allegedly served with process on September 9, 2014 and that Yang's motion to change venue was therefore

untimely. As Yang notes, the Appellate Division's decision and order did not even mention his name. Thus, Chung's argument that personal jurisdiction was obtained over Yang for the first time on September 9, 2014, and not July 8, 2016, when Yang was served with the second amended summons and complaint, is without merit. Therefore, this Court denies Chung's motion for reargument.

Yang's cross motion for sanctions is denied insofar as he has failed to establish that Chung's motion for reargument was frivolous. See 22 NYCRR 130-1.1.

Finally, since Chung did not oppose the motion to dismiss filed by Yang in the related action pending under New York County Index Number 451373/17 because the order to show cause stayed all proceedings in the captioned action and in that action, Chung will have the opportunity to serve papers in opposition to the motion if the related action is not resolved at the settlement conference scheduled for September 27, 2018 (or on any date to which the conference is adjourned).

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Dae Hyun Chung for reargument is denied; and it is further

ORDERED that the cross motion by defendant Raymond Yang for sanctions is denied; and it is further

ORDERED that the parties are to appear for a settlement conference in this action and the related action pending under Index Number 451373/17 on September 27, 2018 at 80 Centre Street, Room 280, at 2:30 p.m.; and it is further

ORDERED that, if this matter and the related action pending under Index Number 451373/17 are not resolved at the settlement conference on September 27, 2018 (or any date to which the conference is adjourned), then plaintiff Dae Hyun Chung will have 30 days from the date of the said conference to serve opposition papers to the motion to dismiss filed by defendant Raymond Yang in the related action pending under New York County Index Number 451373/17 (with a courtesy copy to chambers) and, upon receipt of such opposition papers, this Court will calendar the motion, which had been subject to a stay, for oral argument; and it is further

ORDERED that if this action, or the related action pending under Index Number 451373/17, is not resolved prior to December 4, 2018, the parties are to appear for a discovery conference, relating to either action, or both actions, still active, at 80 Centre Street, Room 280, at 2:30 p.m.; and it is further

ORDERED that all stays are lifted; and it is further

ORDERED that this constitutes the decision and order of the court.

DATED: August 16, 2018

ENTER:

KATHRYN E. FREED, J.S.C.