At an IAS Term of the Supreme Court, held in and for the County of Rensselaer, in the City of Troy, New York, on the 7th day of September 2018

PRESENT: HON. PATRICK J. McGRATH
Justice of the Supreme Court

SUPREME COURT STATE OF NEW YORK
COUNTY OF RENSSELAER

FRANCIS M. HIGGINS,

Plaintiff,

-against-

DECISION AND ORDER
INDEX NO. 253534

CATHERINE M. GOYER, MICHAEL CRANDALL, RICHARD UNGARO and TOWN OF GRAFTON,

Defendants.

APPEARANCES: MILLER, MANNIX, SCHACHNER & HAFNER, LLC
Attorneys for the Plaintiff

MURPHY BURNS, LLP
Attorneys for the Defendant Catherine Goyer

JOHNSON & LAWS, LLC
Attorneys for the Town of Grafton

McGRATH, PATRICK J., J.S.C.

Defendant Catherine Goyer brings this motion pursuant to CPLR 3211(a)(5) to dismiss the Fourth Cause of Action for Defamation. Plaintiff opposes the motion and defendant has submitted a Reply.

The underlying facts of this case are set forth in the Court's prior Decisions and Orders dated January 26, 2017 and October 31, 2018, as well as in Higgins v Goyer, 162 AD3d 1191 (3d Dept. 2018). The Court assumes the parties' familiarity with the facts and procedural history, which will only be referenced when necessary.

Defendant Goyer had previously brought a pre-answer motion pursuant to CPLR 3211(a)(7), seeking to dismiss the causes of action against her for Malicious Prosecution and Defamation. This

Court granted the motion, but the Appellate Division reinstated both causes of action. Higgins v Goyer, *supra*. Issue was then joined by Goyer through the service of a Verified Answer on June 27, 2018. In it, Goyer raised the affirmative defense of the Statute of Limitations. Goyer now moves to dismiss the Defamation cause of action as untimely, pursuant to CPLR 3211(a)(5). Plaintiff opposes the motion, citing the "single motion rule" in CPLR 3211(e). Defendant replies that the motion is permissible as it was filed "well after the Answer" which preserved the Statute of Limitations defense. However, in the alternative, defendant argues that the Court has the ability to convert the motion to one for summary judgment pursuant to CPLR 3212.

The Court agrees with plaintiff that defendant is barred by the single-motion rule from making a second CPLR 3211 (a) motion. CPLR 3211 (e) states, in relevant part:

> "At any time before service of a responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), *and no more than one such motion shall be permitted*. . . A motion based upon a ground specified in paragraphs two, seven or ten of subdivision (a) may be made at any subsequent time or in a later pleading if one is permitted." (Emphasis added).

CPLR 3211(e) permits only one pre-answer motion to dismiss with respect to the grounds asserted here.[1] *See* Held v. Kaufman, 91 NY2d 425, 430 (1998); McLearn v Cowen & Co., 60 NY2d 686 (1983); Rich v Lefkovits, 56 NY2d 276, 281 (1982); Bailey v Peerstate Equity Fund, L.P., 126 AD3d 738 (2d Dept. 2015); Ramos v City of New York, 51 AD3d 753 (2d Dept. 2008); Ancrum v St. Barnabas Hosp., 301 AD2d 474, 475 (1st Dept. 2003); Higgit, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, C3211:51. The purpose of the single-motion rule is not only to prevent delay before answer (Held v Kaufman, *supra*), but also to " 'protect the pleader from being harassed by repeated CPLR 3211 (a) motions'" (Nassau Roofing & Sheet Metal Co. v Celotex Corp., 74 AD2d 679, 680 (1980) [internal quotation marks omitted]) and to conserve judicial resources. The defendant provides no reason for not including CPLR 3211 (a) (5) as an alternative basis for relief in her prior motion.

Even though the defendant may not raise the defense of the statute of limitation in another CPLR 3211 (a) motion, it has been preserved in defendant's Answer. CPLR 3211 (e) (a defense based upon a ground set forth in paragraph five [which includes the statute of limitations] is waived unless raised either by a motion to dismiss or in the responsive pleading); *see also* Siegel, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 3212:20. Therefore, "it may be...raised in another form," such as a summary judgment motion pursuant to CPLR 3212. McLearn v Cowen & Co., 60 NY2d 686, 689 (1983) *citing* Rich v Lefkovits, 56 NY2d 276, 281-82 (1982); *see also* Higgit, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, C3211:51 ("[W]hen the CPLR 3211 motion has been used up, [t]he device should be the summary judgment motion of CPLR 3212.").

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[1] The statute permits for motions to dismiss to be made upon a ground specified in paragraphs two, seven or ten after the Answer has been filed, but the grounds here are 3211(a)(5).

Under CPLR 3211 (c), the Court has the discretion to convert this motion to one for summary judgment, provided the Court gives ample notice to the parties to "make a complete record and to come forward with evidence that could be considered." Nonnon v City of New York, 9 NY3d 825, 826 (2007); *see also* Mihlovan v Grozavu, 72 NY2d 506 (1988). One of the bases for such conversion is that it can lead to an "expeditious disposition of the controversy." CPLR 3211 (c).

In the action at hand, the Court concludes that "expeditious disposition of the controversy" is possible. In this case, the statute of limitations applicable to Defamation is one year (CPLR 215 [3]), and generally accrues on the date of the first publication. Colantonio v Mercy Med Ctr., 115 AD3d 902, 903 (2d Dept. 2014); Hochberg v Nissen, 180 AD2d 435, 436 (1st Dept. 1992), appeal denied 80 NY2d 755. In this case, the alleged defamatory statements were made on February 18, 2015 and February 20, 2015. Plaintiff filed his complaint on July 6, 2016, and therefore, defendant claims that it is untimely. However, defendant relies on his allegation contained in Paragraph 21 of the Complaint, namely, that the defendant "republished" the statements "to the press." Plaintiff also requests time to conduct discovery concerning the dates that Goyer published or republished the allegedly defamatory statements.

"An exception to the single publication rule is the concept of 'republication.'" Hoesten v. Best, 34 AD3d 143, 150 (1st Dept. 2006). Republication may occur when 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." Martin v Daily News, L.P., 121 AD3d 90 (1st Dept. 2014) (internal quotations omitted). "'Whether a particular event constitutes a republication giving rise to a new cause of action with a refreshed limitations period must be analyzed on a case-by-case basis." Martin v Daily News, L.P., 35 Misc 3d 1212[A] (Sup. Ct., New York County 2012).

Whether defendant republished these allegedly defamatory statements "in the press" is certainly capable of summary resolution. Should plaintiff contend that discovery is necessary in order to oppose defendant's summary judgment motion, he should be prepared to argue why he needs discovery to determine whether the statements were re-published "in the press" or how this would be in defendant's exclusive knowledge. A motion for summary judgment should not be denied for lack of disclosure unless the party opposing the motion identifies the needed disclosure. Auerbach v Bennett, 47 NY2d 619, 636 (1979). "To speculate that something might be caught on a fishing expedition provides no basis to postpone decision on summary judgment...." Id.

It is therefore

ORDERED that defendant's motion for an order, pursuant to CPLR 3211 (a) (5) dismissing the defamation cause of action as time-barred is converted to a motion for summary judgment, pursuant to CPLR 3211 (c); and it is further

ORDERED that plaintiff shall serve and file papers in opposition to defendant's motion for

summary judgment within 30 days of service of a copy of this interim decision and order with notice of entry; and that defendant shall serve and file reply papers in further support of his motion for summary judgment within 15 days of receipt of opposition papers.

This shall constitute the Decision and Order of the Court, which is being returned to the attorneys for the defendant Catherine Goyer. The Court will retain all original supporting documentation until the motion is resolved. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

DATED: November 1, 2018
Troy, New York

PATRICK J. McGRATH
Justice of the Supreme Court

Papers Considered:

1. Notice of Motion to Dismiss, dated August 17, 2018; Affidavit, Stephen M. Groudine, Esq., dated August 17, 2018, with annexed Exhibits A-D.
2. Affidavit and Memorandum of Law, Thomas W. Peterson, Esq., dated August 31, 2018.
3. Reply, Stephen M. Groudine, Esq., dated September 5, 2018.