

Guo Wengui v Nunberg
2019 NY Slip Op 33699(U)
December 18, 2019
Supreme Court, New York County
Docket Number: 162069/18
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

GUO WENGUI a/k/a MILES KWOK et al.

INDEX NO. 162069/18

- v -

SAM NUNBERG et al.

MOT. DATE

MOT. SEQ. NO. 001 and 002

The following papers were read on this motion to/for

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s) _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s) _____

Replying Affidavits

NYSCEF DOC No(s) _____

This action is for alleged defamation. Defendants have filed two motions to dismiss, which are hereby consolidated for the court's consideration and disposition in this single decision/order. In sequence 001, defendant Zheng Wu a/k/a Bruno Wu ("Wu") moves to dismiss the amended complaint for failure to state a cause of action, lack of personal jurisdiction and based upon the statute of limitations. In sequence 002, defendant Sam Nunberg ("Nunberg") moves to dismiss on similar grounds. Nunberg further seeks sanctions. Plaintiffs oppose both motions. The court's decision follows.

Plaintiffs are Wengui Guo a/k/a Miles Kwok ("Guo") and Beijing Pangu Investment Co., Ltd. ("Pangu"), and Beijing Zenith Holdings, Co., Ltd ("Zenith"). In his complaint, Guo alleges that he left China at the end of 2014 and is currently seeking political asylum in the United States and describes himself as "a longstanding critic of corruption within elements of the Chinese government and a leading advocate for government reform in China." Guo claims that he came to the United States in 2015 after exposing corruption in China involving unrelated non-parties and entities. He states that "being a vocal opponent of corruption has made him a high-profile target for corrupt individuals..."

Allegations against Wu

The complaint alleges that Wu is the co-Chairman and CEO of Sun Seven Starts Entertainment & Media Group Limited and the former Chairman of Sun Media Group in China. Wu allegedly contacted Guo via chat message and telephone in New York and offered to "serve as a 'middle man' to convey a monetary offer from plaintiff" to another non-party to delete an article "concern[ing] political favors [] Guo allegedly received from a former Chinese government official." Wu thereafter "demanded that [] Guo provide assistance to [] Wu and his co-conspirators" and promised Guo "protection from what [] Wu claimed was 'the Chinese government' if [] Guo acceded to [] Wu's demands."

Guo complains that Wu required his assistance under duress to "continue with Wu's mission." That mission is unspecified. Wu allegedly demanded that Guo return to China and "suggested that the safety

Dated: 12/18/19

HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: [X] CASE DISPOSED [] NON-FINAL DISPOSITION
2. Check as appropriate: Motion is [] GRANTED [] DENIED [X] GRANTED IN PART [] OTHER
3. Check if appropriate: [] SETTLE ORDER [] SUBMIT ORDER [] DO NOT POST
[] FIDUCIARY APPOINTMENT [] REFERENCE

of [] Guo's family in China depended on [Guo's] continued cooperation." Nonetheless, "several of [] Guo's family members and employees were arrested and jailed" including his wife, daughter, brothers and sister-in-law. Wu purportedly said to Guo on or around January 10, 2015:

First, every request raised to you is made on behalf of the Special Investigation Team of Central Discipline Inspection Commission; Second, you have to go on investigating [individual] in America and collect related information. You should deliver the related materials to me in a secure way as soon as possible; Third, do whatever I ask you to do unconditionally. That is good for you; Fourth, for the arrest of your family and staff and seizure of assets and accounts by the Special Investigation Team arrested your family and staff, only once you go back to China and cooperate with the investigation, we can sort that out.

Otherwise, plaintiff complains that Wu acted as a foreign agent on behalf of the Chinese government without "authority to do so", that Wu's threats "were damaging [Guo's] businesses and relationships with third parties" and "were causing [Guo] extreme stress and anxiety." The last in-person communication alleged between Wu and Guo occurred in January 2015. During that time, Wu purportedly "followed through on his threats" to seize plaintiff's assets. Guo further claims that "[t]hroughout 2016 and 2017, [] Wu used third-parties to threaten, intimidate and silence [] Guo... upon information and belief."

Allegations against Nunberg

Plaintiffs allege, upon information and belief, that "Wu also conspired with [] Nunberg to spread false information about [Guo] to prominent United States media personalities." Specifically, he asserts that between early September 2017 and early 2018, Nunberg falsely told Roger Stone that Guo "has been found guilty and convicted of financial crimes in the United States and that [Guo] violated U.S. election law by making political donations to Hillary Clinton and financing a presidential run by Steven Bannon." Plaintiff states, upon information and belief, that Wu paid Nunberg to pass along this false information and that Wu and/or Nunberg agreed to pay Stone to publish same on his media websites. Stone published such information in or about March 2018 and in or about December 2018, publicly retracted same.

Stone's retraction purportedly admitted that the false information was conveyed to him by Nunberg and that the source of Nunberg's information was Wu.

Plaintiffs' claims and other filings

Plaintiff asserts five causes of action against Wu only which are for: [1] tortious interference with business relations (1st COA); [2] aiding and abetting conversion (2nd COA); [3] aiding and abetting trespass (3rd COA); [4] intentional infliction of emotional distress (4th COA); and [5] *prima facie* tort (7th COA). The remainder are against both defendants and are for defamation *per se* and "conspiracy to defame Guo reputation."

After Wu's motion was filed, but before Nunberg's motion was filed, counsel for plaintiff and Nunberg entered into a stipulation agreeing to dismiss, without prejudice, plaintiff's fourth, fifth and sixth causes of action against Nunberg, only. First, Nunberg's name is not even mentioned in the fourth cause of action. Further, despite the stipulation, Nunberg still moved to dismiss the fifth and sixth causes of action. It is unclear why Nunberg did so, and neither party addresses the stipulation in their motion papers.

Parties' arguments

Wu is a United States citizen with a domicile in China. He contends that the defamation claims against him should be dismissed for lack of personal jurisdiction and that the balance of plaintiffs'

claims "target[] the Chinese government's conduct in China [and] are barred by the act of state doctrine" Otherwise, he argues that plaintiffs' claims are time-barred and fail to state a cause of action.

Nunberg maintains that the "conspiracy to defame" claim should be dismissed outright under established precedent. Nunberg argues that the defamation *per se* claim is not sufficiently particular, is time-barred and otherwise fails to allege a *prima facie* cause of action. Finally, Nunberg claims that "because plaintiffs' claims are without basis in fact or law, and because the Amended Complaint relies upon a material misrepresentation", sanctions against both plaintiff and his counsel are warranted pursuant to 22 NYCRR 130-1 and CPLR 8303-a.

Meanwhile, plaintiffs' counsel generally argues that the claims are legally sufficient, timely, that Wu was properly served and that sanctions are not warranted.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez*, *supra* at 88).

The court will first consider the defamation claims. Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014] citing *Foster v. Churchill*, 87 NY2d 744, [1996]). Whether the statements constitute fact or opinion is a question of law for the court to decide (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831).

The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon*, *supra* at 38).

In evaluating the viability of a defamation claim, the words must be construed in the context of the entire statement before an ordinary audience, and if the statement is not reasonably susceptible to a defamatory meaning, the claim is not actionable (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831). "Courts will not strain to find defamation where none exists" (*Dillon*, *supra* at 38 [internal quotation omitted]).

Here, plaintiffs have wholly failed to meet their pleading burden. There are no facts about when and where either Nunberg or Wu made false statements about plaintiff, nor are the particular words either defendant used asserted in the complaint. This failure to set forth sufficient detail to support the cause of action is fatal to a claim for defamation (*Gardner v. Alexander Rent-A-Car, Inc.*, 28 AD2d 667 [1st Dept 1967]). Indeed, without any facts about when the alleged statements occurred, the court cannot find that his cause of action was timely commenced.

Moreover, as defendants correctly argue, New York does not recognize a cause of action for conspiracy to defame (see generally *Alexander & Alexander of New York, Inc. v. Fritzen*, 68 NY2d 968 [1986]).

Accordingly, Wu and Nunberg's motions are granted to the extent that the defamation claims are severed and dismissed.

As for the balance of Wu's motion, it must also be granted. Plaintiffs' allegations largely assert that Wu acted on behalf of China. To the extent that plaintiffs' challenge the propriety of China's seizure of plaintiffs' assets, the act of state doctrine precludes review of a foreign country's seizure of property within its borders (*Perez v. Chase Manhattan Bank*, 61 NY2d 460, 469 [1984]). Otherwise, plaintiffs have failed to allege any claims which would fall within the applicable statute of limitations period. This action was commenced December 21, 2018 and the last non-defamation factual allegation concerning Wu occurred in January 2015. For at least these reasons, the balance of Wu's motion is granted.

Finally, the court must address Nunberg's application for sanctions. He contends that sanctions are warranted because plaintiff's claims are meritless and were brought to injure and/or harass him.

22 NYCRR 130-1.1 [c] defines conduct as frivolous if: [1] it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; [2] it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or [3] it asserts material factual statements that are false. CPLR 8303-a permits an award of costs and reasonable attorney's fees not exceeding ten thousand dollars upon a finding that a personal injury action is "frivolous."

Here, although plaintiffs did not prevail, the court cannot say that plaintiff's conduct was frivolous or otherwise the type of conduct which Part 130 was designed to discourage. Indeed, plaintiff seemingly withdrew the defamation claims against Nunberg via written stipulation before Nunberg filed his motion to dismiss. On this record, sanctions are not warranted.

CONCLUSION

Accordingly, it is hereby

ORDERED that both motions are granted to the extent that plaintiff's complaint is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

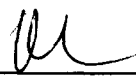
ORDERED that the motions are otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated:

12/18/19
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.