

<b>H. Roske &amp; Assoc., LP v Burghart</b>
2020 NY Slip Op 34220(U)
December 17, 2020
Supreme Court, New York County
Docket Number: 657328/2017
Judge: Barry Ostrager
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**SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY**

**PRESENT: HON. BARRY R. OSTRAGER, PART IAS 61EF**

*Justice*

-----X

H. ROSKE & ASSOCIATES, LP  
Plaintiff,

- v -

CHRISTIAN BURGHART, SCHUMANN BURGHART  
LLP, LUKE GYURE, AND HEIKO MEYENSCHEN,  
Defendants.

INDEX NO.	657328/2017
MOTION DATE	
MOTION SEQ. NO.	009

CHRISTIAN BURGHART AND SCHUMANN  
BURGHART, LLP,  
Counterclaim plaintiffs,

**DECISION AND ORDER ON MOTION**

-v-

-----X  
H. ROSKE & ASSOCIATES LLP AND HENRY ROSKE,  
Counterclaim defendants

-----X  
HON. BARRY R. OSTRAGER

The Court heard oral argument via Microsoft Teams on December 17, 2020. Based on the documents submitted and the proceedings on the record, counterclaim defendants’ motion to dismiss the counterclaims is granted in part and denied in part as follows.

Counterclaim defendants’ motion to dismiss the first counterclaim for defamation is granted. The first counterclaim alleges that Henry Roske of H. Roske & Associates LLP (“the Roske Firm”), defamed Christian Burghart and Schumann Burghart, LLP (“the SB Firm”) by falsely telling a client of the Roske Firm, Vierol, that Schumann (partner at the SB Firm) had incorrectly filed a Visa application prior to his departure from the Roske firm. The alleged defamatory statements made by Henry Roske to Vierol appear in e-mails dated November 2016.

Claims for defamation are subject to a one-year statute of limitations from the date of publication of the alleged defamatory statement. *See e.g. See, e.g., Fleischer v. Institute For*

*Research in Hypnosis*, 57 A.D.2d 535 (1st Dep't 1977). Thus, a claim for defamation based on statements made in November 2016 must have been made by November 2017. This action was initiated in December 2017, and counterclaim plaintiffs filed their amended counterclaims in March 2020.

In opposition, counterclaim plaintiffs argue that they could not have brought a defamation claim within the statute of limitations, because the e-mails containing the defamatory words were not produced in discovery in this action until February 2020 and therefore the statute of limitations does not bar plaintiffs' claims. However, the law on the statute of limitations is specific that the statute of limitations runs from the date of publication of the defamatory words, not discovery. *See Fleischer*, 57 A.D.2d 535 (holding that the statute of limitations on action for libel began to run on the date of the publication, not date of discovery of the libel); *see also Teneriello v. Travelers Companies*, 226 A.D.2d 1137 (Fourth Dep't 1996) (holding that the defamation action accrued when alleged defamatory statements were published, not two years later when plaintiff discovered the statements).

A party may be estopped from raising a statute of limitations defense where there is an affirmative misrepresentation or active concealment of a fact. That is not the situation here. As Justice Scarpulla previously noted, counterclaim plaintiffs had various methods of discovering the alleged defamation including the opportunity to seek discovery from any party to whom the defamatory statements had been made. *See* NYSCEF Doc. No.166 at p. 55:13 – 15. Accordingly, because this claim was brought well after the applicable statute of limitations expired, count one for defamation is dismissed.

Counterclaim defendants' motion to dismiss the second counterclaim for defamation is denied. The second counterclaim for defamation alleges that Henry Roske made defamatory

statements about Schumann Burghart, which could be reasonably understood to be about the SB Firm to Ridel, a client of the Roske Firm. These defamatory statements appear in an e-mail dated March 22, 2018. Counterclaim defendants included this counterclaim in their first Answer and Counterclaims filed on August 30, 2019.

While according to the above analysis, this counterclaim should have been filed by March 22, 2019, the Court finds that counterclaim plaintiffs have waived a statute of limitations defense with respect to this particular claim. *See* CPLR 3211 (e). Counterclaim plaintiffs moved before Justice Scarpulla to dismiss the counterclaims on September 19, 2019 and did not raise a statute of limitations defense. Justice Scarpulla heard oral argument on the motion (008) on November 16, 2019 and counterclaim plaintiffs did not raise a statute of limitations defense. Justice Scarpulla issued a written decision on the motion on February 9, 2020 and declined to dismiss this claim for defamation. *See* NYSCEF Doc. No. 171 a p. 4 -5. As such, the second counterclaim for defamation may proceed.

Counterclaim defendants' motion to dismiss the third counterclaim for tortious interference with business relations is granted in part and denied in part. The third counterclaim alleges that Henry Roske and the Roske Firm tortiously interfered with counterclaim plaintiffs' business relationship with four clients of the Roske Firm that had allegedly committed to transferring their business to the SB Firm: Vierol, Reidel, SternMaid, and Almamet. To state a claim for tortious interference with a business relationship, the claimant must allege (1) that it had a business relationship with a third party; (2) that the defendant knew of that relationship and intentionally interfered with it; (3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's

interference caused injury to the relationship with the third party.” See *Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 50 N.Y.2d 183 (1990).

Counterclaim plaintiffs argue that counterclaim defendants engaged in a pattern of making defamatory statements sufficient to constitute an allegation of malice. However, counterclaim plaintiffs fail to make any specific allegations of malice or improper means with respect to SternMaid and Almamet and thus the allegations regarding SternMaid and Almamet must be dismissed. Regarding Vierol and Reidel, the defamation allegations fulfill the wrongful means requirement. But, because the defamation claim regarding Vierol has been dismissed, the tortious interference with a business relationship claim must also be dismissed. Accordingly, only the tortious interference with a business relationship claim concerning Reidel shall proceed.

Accordingly, it is hereby,

ORDERED that counterclaim plaintiffs’ motion (009) is granted in part and denied in part to the extent described above and denied in all other respects. A status conference is scheduled for February 23, 2021 at 10:00 am in this action and the related action *German American Trade Association v. Schumann Burghart LLP et al* 158548/2019.

Dated: December 17, 2020

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE