

Dongsheng Jia v Tian Wang

2021 NY Slip Op 32695(U)

December 16, 2021

Supreme Court, New York County

Docket Number: Index No. 156291/2019

Judge: John J. Kelley

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

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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DONGSHENG JIA,

Plaintiff,

- v -

TIAN WANG, GRACE SU, WEIPING QIN, DAXIA TAN,
XIAOBO FU, XIAOLI QI, and ZHENHUA CHEN,

Defendants.

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INDEX NO. 156291/2019

MOTION DATE 09/23/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18, 19, 20
were read on this motion to/for DISMISSAL.

In this action to recover damages for defamation and fraud, the defendants Grace Su, Weiping Qin, Daxia (Lucy) Tan, Xiaobo Fu, Xiaoli Qi, and Zhenhua Chen (collectively the movants) move pursuant to CPLR 3211(a) to dismiss the amended complaint insofar as asserted against them as time-barred (CPLR 3211[a][5]) and for failure to state a cause of action (CPLR 3211[a][7]). The plaintiff opposes the motion. The motion is granted on the ground that the amended complaint fails to state a cause of action because, among other things, the allegations set forth therein do not set forth the bases for the causes of action with the necessary specificity (see CPLR 3016).

In the first instance, the movants' request to dismiss the amended complaint against them as time-barred is procedurally improper, and that issue may not be raised at this juncture on a motion pursuant to CPLR 3211(a). The movants have already answered the complaint, and asserted, as an affirmative defense, that the action is barred by the applicable one-year limitations period.

"A motion to dismiss the complaint based on a ground listed in CPLR 3211(a)(5) must be made before answering (see CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:21). A

motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading (*id.*). Summary judgment is, therefore, a post answer device (*id.*). Any of the grounds on which a CPLR 3211 motion could have been made here re service of the answer can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (CPLR 3211[e]; Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:20). Having preserved the affirmative defense in their answer, defendants were not also entitled to serve a pre-answer motion to dismiss, which is a procedural irregularity. Defendants [are] required to move for summary judgment on the statute of limitations issue inasmuch as they had served their answer”

(*Lusitano Enters., Inc. v Horton Bros., Inc.*, 2018 NY Slip Op 32011[U], *3-4, 2018 NY Misc LEXIS 3587, *5-6, [Sup Ct, Suffolk County, Aug. 14, 2018]; see *Higgins v Goyer*, 2018 NY Slip Op 33520[U], *2, 2018 NY Misc LEXIS 9607, *3 [Sup Ct, Rensselaer County, Nov. 1, 2018]; see also *McLearn v Cowen & Co.*, 60 NY2d 686, 689 [1983]; *Rich v Lefkovits*, 56 NY2d 276, 282 [1982] [“we answer in the affirmative the question . . . concerning whether defendant may move after answer for summary judgment on his jurisdictional defense”]).

A motion to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, however, may be made at any time (see *M&E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 6 [1st Dept 2020]; CPLR 3211[e]). Contrary to the plaintiff's contention, the instant motion was not improperly noticed. Pursuant to CPLR 2214(b),

“[a] notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard. Answering affidavits shall be served at least two days before such time. Answering affidavits and any notice of cross-motion, with supporting papers, if any, shall be served at least seven days before such time if a notice of motion served at least sixteen days before such time so demands; whereupon any reply or responding affidavits shall be served at least one day before such time.”

Here, the movants provided the plaintiff with 10 days notice of the motion. Even though the movants did not provide notice sufficient to allow them to demand that opposing papers be served at least 7 days prior to the return date, “since [the] notice of the motion was not less than the minimum time period authorized by CPLR 2103(b)(2) and 2214(b), . . . the defect was not jurisdictional” (*Capoccia v Brognano*, 132 AD2d 833, 834 [3d Dept 1987]).

In the initial complaint, the plaintiff alleged that both he and the defendants were Chinese-Americans who were active in organizations that supported Donald Trump for reelection as president of the United States. In the complaint, he described some of the disputes that he had with the defendants in connection with those organizations and their various political activities, and asserted that the defendants were liable to him for defamation and fraud. In his amended complaint, the plaintiff lays out a detailed factual description of factional in-fighting between the defendants and him, most of them involving petty disputes and attempts to claim the mantle of an organization known as Chinese-Americans for Trump (CAFT), as well as disputes between CAFT and another purportedly pro-Trump organization known as the Ting-Trump Alliance. As relevant to the substantive claims for relief asserted by the plaintiff, the amended complaint asserted that

“Fu, Xiaobo and Chuan Mei [also known as Xiaoli Qi] wrote an article signed by over 40 members of CAFT denying the fact that [a] 10/29 rally was organized by the Plaintiff. The article also rumored, discriminated and defamed the Plaintiff and the Alliance. The article rumored that 1) the Plaintiff embezzled \$3,800 from the Alliance 2) the Plaintiff was hired and controlled by Chinese Communists 3) the T-shirts of the Alliance was [sic] poisonous 4) the purpose of producing T-shirts was to cover up the fact of corruption of Chinese Communists.

“In April, 2017, Qi, Xiaoli (Chuan Mei), as the core member of CAFT, wrote article to attack the Alliance and the Plaintiff. From June to October, 2018, Qi, Xiaoli (Chuan Mei) posted articles in some Wechat group to attack the Alliance and the Plaintiff. Qi, Xiaoli (Chuan Mei) claimed that her actions were approved and supported by Tan, Daxia, Qin, Weiping and other Defendants.

The amended complaint also set forth numerous alleged instances of political “dirty tricks” that the defendants allegedly committed to discredit the plaintiff and the plaintiff’s organization.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (*id.* at 152; see *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013];

Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (see *Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267 [1st Dept 2004]; CPLR 3026). "The motion must be denied if from the pleading's four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 152 [internal quotation marks omitted]; see *Leon v Martinez*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

There are enhanced pleading requirements, however, with respect to claims seeking to recover for defamation and fraud. CPLR 3016(a) provides that, "[i]n an action for libel or slander, the particular words complained of shall be set forth in the complaint, but their application to the plaintiff may be stated generally." CPLR 3016(b) provides that [w]here a cause of action or defense is based upon misrepresentation [or] fraud . . . , the circumstances constituting the wrong shall be stated in detail."

"The elements of a cause of action [to recover damages] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se"

(*Caccione v Scarpinato*, 137 AD3d 857, 859 [2d Dept 2016], quoting *Epifani v Johnson*, 65 AD3d 224, 233 [2d Dept 2009]). "To establish actionable defamation, it must be shown that the facts are false and that their publication was generated by actual malice, i.e. with a purpose to inflict injury upon the party defamed, or in a grossly irresponsible manner" (*Kuan Sing Enterprises, Inc. v T.W. Wang, Inc.*, 86 AD2d 549, 550 [1st Dept 1982], *affd* 58 NY2d 708 [1982], citing *Chapadeau v Utia Observer-Dispatch, Inc.* 38 NY2d 196 [1975]). To impose liability in a defamation action commenced by a person who is not a public figure, in connection with a matter of public concern, "the party defamed must establish by preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration

for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer-Dispatch*, 38 NY2d at 199; see *Huggins v Moore*, 94 NY2d 296 [1999]; *Farber v Jefferys*, 103 AD3d 514 [1st Dept 2013]). A person is grossly irresponsible in this regard when he or she fails to verify the accuracy or veracity of information before disseminating it (see *Matovcik v Times Beacon Record Newspapers*, 108 AD3d 511 [2d Dept 2013]), or evinces an inability or unwillingness to take any steps to obtain such a verification (see *Fraser v Park Newspapers of St. Lawrence, Inc.*, 246 AD2d 894 [3d Dept 1998]). False "[a]ccusations of criminal or illegal activity, even in the form of an opinion, are not constitutionally protected" (*Angel v Levittown Union Free School Dist. No. 5*, 171 AD2d 770, 772 [2d Dept 1991]; see *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 382 [1977]). To constitute per se defamation, however, the false statement must allege a crime involving moral turpitude that appreciably affects the plaintiff's reputation (see *Berkson v Time, Inc.*, 8 AD2d 352, 354 [1st Dept 1959]).

The allegations referable to the article allegedly written by the defendants Fu, Xiaobo, and Qi concerning embezzlement and the Chinese Communists' alleged control of the plaintiff, even if facially defamatory, do not specify the date when the article was written or published, the means by which it was published, or the persons to whom it was published. The allegations referable to the April 2017 article purportedly written by Qi and posted on WeChat do not describe the words set forth in the article, only that the article or articles "attacked" the plaintiff and the Ting-Trump Alliance. Hence, the claim to recover for defamation must be dismissed both for failure to allege facts supporting every element of that cause of action, and for failure to comport with CPLR 3016(a) (see *Hammond v Equinox Holdings LLC*, 193 AD3d 586, 587 [1st Dept 2021]).

To assert a claim sounding in fraud, a plaintiff must allege an intentional misrepresentation of facts, made to induce the other party to rely on it, reasonable reliance of the damaged party on those facts, and damages (see *Lama Holding Co. v Smith Barney*, 88

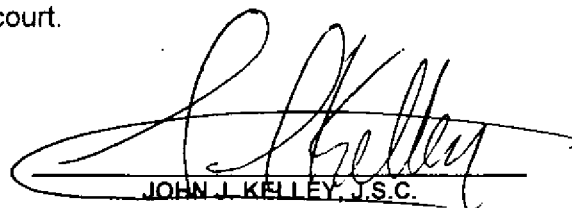
NY2d 413, 421 [1996]). Although the amended complaint provides, in great detail, a description of the various disputes and political infighting by and between the plaintiff and the movants, it sets forth no facts supporting a claim that the plaintiff reasonably relied upon an intentional misrepresentation by the movant to his detriment. Hence, the amended complaint does not state in detail the circumstances constituting the purported fraud, and that cause of action must be dismissed as well.

Accordingly, it is

ORDERED that the motion of the defendants Grace Su, Weiping Qin, Daxia (Lucy) Tan, Xiaobo Fu, Xiaoli Qi, and Zhenhua Chen to dismiss the amended complaint insofar as asserted against them is granted, and the amended complaint is dismissed insofar as asserted against the defendants Grace Su, Weiping Qin, Daxia (Lucy) Tan, Xiaobo Fu, Xiaoli Qi, and Zhenhua Chen.

This constitutes the Decision and Order of the court.

12/16/2021
DATE



JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	