

To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

----- X
RICHARD FIELDS,
Plaintiff,

– against –

Index No. 50797/2016

THE COUNTY OF WESTCHESTER, et al.,
Defendants.
----- X

DECISION & ORDER

The following papers numbered 1 to 8 were read on the “Journal News” defendants’ motion to dismiss the complaint insofar as asserted against them and plaintiff’s cross motion to amend the summons with notice and the complaint.

PAPERS NUMBERED

Notice of Motion/Affidavits/Exhibits _____	1-3
Notice of Cross Motion/Affirmation/Exhibits _____	4-6
Reply and Opposition _____	7
Affirmation in Reply _____	8

Factual and Procedural Background

This defamation action arose from a series of articles published in The Journal News concerning a transcript scandal among the men’s basketball team at Westchester Community College.

Plaintiff commenced this action seeking damages for defamation against, inter alia, Gannett Satellite Information Network, LLC (“Gannett”) which publishes The Journal News and its staff writers and reporters Lee Higgins, Mike Zacchio, Jorge Fitzgibbon, Hoa Nguyen, and Mike Doherty, as well as Janet Hasson, its president and publisher (collectively the “Journal News defendants”).¹

¹ This action was originally commenced against, inter alia, The Journal News, Gannett Satellite Information Network, Inc., and CynDee Royle who is recently deceased. By Stipulation, The Journal News has been removed from the caption; Gannett Satellite Information Network, LLC has been substituted for Gannett Satellite Information Network, Inc.; and the action has been dismissed against CynDee Royle.

The Journal News defendants move to dismiss the complaint insofar as asserted against them pursuant to CPLR § 3211(a)(8) for lack of personal jurisdiction and CPLR § 3211(a)(7) for failure to state a cause of action.

Between 2010 and 2014 plaintiff Richard Fields was the assistant men's basketball coach at defendant Westchester Community College in Valhalla, New York. The head basketball coach at the time was defendant Tyrone Mushatt. On or about October 16, 2014, plaintiff's employment was terminated on the grounds that he violated school policy.

As asserted in the complaint, on October 25, 2014, The Journal News published an article entitled "Players lose aid in fake grades probe: WCC fires men's basketball coach" with a byline by defendants Lee Higgins and Mike Zacchio. The article contained the following statements which plaintiff alleges were defamatory: "a Westchester Community College assistant men's basketball coach has been fired amid a criminal investigation into transcript fraud"; "Westchester Community College assistant basketball coach Richard Fields was fired Oct. 16 after admitting he provided a phony transcript for [former student Jamell] Walker and forged the signature of an administrator on an eligibility form for Walker, said WCC spokesman Pat Hennessey"; "He manufactured a fake transcript,' Hennessey said of Fields. 'Jamell took one course here. The transcript said he earned a full degree and graduated.'"; "Hennessey confirmed that the New York State Office of the Inspector General is aware of the situation. 'No criminal charges have yet been filed'"; and "Hennessey said WCC officials spoke with head coach Tyrone Mushatt and 'we determined that Mushatt was not involved, unaware, had nothing to do with this.'"

The complaint alleges that the Journal News defendants published the foregoing defamatory statements in its newspaper and internet media outlet which were known by them to be false and which were published without adequate or competent investigation. The complaint further alleges that following an investigation conducted by the Westchester County District Attorney's Office and the New York State Inspector General's office, the defendant Tyrone Myshatt was arrested on criminal charges relating to falsifying the transcripts.

Plaintiff originally commenced this action by the filing and service of a summons with notice in Bronx County, however, the action was thereafter transferred to Westchester County and given a new index number. Plaintiff filed and served a second summons with notice under the Westchester County index number.

On January 12, 2016, the original summons with notice was personally delivered to Nora Pietrafesa at the White Plains office of the Journal News, on behalf of defendants Lee Higgins, Mike Zacchio, Jorge Fitzgibbon, Hoa Nguyen, Mike Dougherty, Janet Hasson, and Gannett.

On January 29, 2016, the second summons with notice was delivered to George Troyano at the White Plains office of the Journal News, on behalf of defendants Lee Higgins, Mike Zacchio, Jorge Fitzgibbon, Hoa Nguyen, Janet Hasson, Mike Dougherty, and Gannett. The second summons with notice was also mailed on March 8, 2016, to the Journal News White Plains office for purported service upon Gannett, Lee Higgins, Mike Zacchio, Jorge Fitzgibbon, Mike Dougherty, and Janet Hasson.

In support of the Journal News defendants' motion, Janet Hasson submits an affidavit attesting that she resigned her position with Gannett effective March 6, 2015, and has been residing in Rhode Island since June 2015. At the time of the purported service of the summons with notice, Ms. Hasson was no longer an employee of Gannett or a resident of New York. In addition, Ms. Hasson attests that she has never been personally served in this action and has never received a mailed copy of the summons with notice at her residence or place of work.

Hoa Nguyen submits an affidavit in support of the motion to dismiss attesting that as of January 8, 2016, she resigned her position with Gannett and since April 2016, she resided in Connecticut. Ms. Nguyen attests that she has never been personally served with any summons with notice in this action nor has she received a copy of the summons with notice in the mail at her home or at her place of work.

Nora Pietrafesa submits an affidavit in support of the motion to dismiss in which she attests that on January 12, 2016, she was at the Journal News offices in White Plains when a process server sought to deliver several summonses in connection with this lawsuit. Ms. Pietrafesa attests that while she is authorized to accept process on behalf of the Journal News, she has never been an agent for service on Janet Hasson, Hoa Nguyen, Lee Higgins, Mike Zacchio, Jorge Fitzgibbon, or Mike Dougherty. In addition, Ms. Pietrafesa attests that she told the process server that Ms. Hasson and Ms. Nguyen were no longer employed by the Journal News.

George Troyano submits an affidavit in support of the motion to dismiss attesting that on January 29, 2016, a process server came to the offices of the Journal News in White Plains, New York, to deliver several summonses in connection with this lawsuit. Mr. Troyano attests that although he is authorized to accept process on behalf of the Journal News, he has never been an agent for service on Janet Hasson, Hoa Nguyen, Lee Higgins, Mike Zacchio, Jorge Fitzgibbon or Mike Dougherty. According to Mr. Troyano, he told the process server that Ms. Hasson and Ms. Nguyen were no longer employed by the Journal News.

Discussion

Personal Jurisdiction

The Journal News defendants argue that the complaint should be dismissed insofar as asserted against the individual defendants on the ground that they were never properly served pursuant to CPLR § 308.

The court does not have personal jurisdiction over a defendant when a plaintiff fails to properly effectuate service of process (*see Washington Mut. Bank v. Murphy*, 127 AD3d 1167, 1173 [2nd Dep't 2015]). "In a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment (internal citation omitted). Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court" (*Macchia v. Russo*, 67 NY2d 592 [1986]).

CPLR § 308 sets forth the different ways in which service of process upon an individual can be effected in order for the court to obtain jurisdiction over that person (*see*

Washington Mut. Bank v. Murphy, 127 AD3d at 1174). Service of process must be made in strict compliance with statutory "methods for effecting personal service upon a natural person" pursuant to CPLR 308 (*Estate of Waterman v. Jones*, 46 AD3d 63 [2nd Dep't 2007] citing *Macchia v. Russo*, 67 NY2d at 594).

Service may be made pursuant to CPLR 308(1) by personal delivery of the summons to the person to be served. Here, there is no dispute that service was not made by personal delivery upon any of the individual Journal News defendants.

Personal service upon a natural person may also be made pursuant to CPLR § 308(2) "by delivering the summons within the state to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode of the person to be served and by either mailing the summons to the person to be served at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business ... such delivery and mailing to be effected within twenty days of each other". Jurisdiction is acquired by strict compliance with both the delivery and mailing requirements (see *Gray-Joseph v. Shuhai Liu*, 90 AD3d 988, 989 [2nd Dept. 2011]; *Ludmer v. Hasan*, 33 AD3d 594 [2nd Dept. 2006]).

Plaintiff has the burden of proof, by a preponderance of the evidence, that jurisdiction over the defendants was obtained through proper service of process (see *Aurora Loan Servs., LLC v. Gaines*, 104 AD3d 885 [2nd Dept. 2013]; *Gottesman v. Friedman*, 90 AD3d 608, 609 [2011]). Generally, a process server's affidavit constitutes a prima facie showing of proper service (see *Aurora Loan Servs., LLC v. Gaines*, 104 AD3d at 886; *U.S. Bank, N.A. v. Arias*, 85 AD3d 1014, 1015 [2011]).

Here, the process server's affirmation of service dated January 15, 2016, merely demonstrates that the summons with notice was personally delivered to the Journal News office in White Plains. It fails to state whether the summons with notice was also mailed to the last known residences of the defendants or their actual place of business in accordance with CPLR 308(2) (see *Steele v. Hempstead Pub Taxi*, 305 AD2d 401 [2nd Dept. 2003]).

The process server's affirmation of service dated March 8, 2016, demonstrates that the summons with notice was personally delivered on January 29, 2016, to the Journal News office in White Plains. At the time of such delivery, Ms. Hasson and Ms. Nguyen were not employed by Gannett. Therefore, personal service was not effectuated upon Ms. Hasson or Ms. Nguyen inasmuch as the summons with notice was not delivered to their actual place of business, dwelling place or usual place of abode (see CPLR 308[2]).

Moreover, as to all of the individual Journal News defendants the summons with notice was required to be mailed to the last known residence or actual place of business within twenty days of personal delivery. However, the affirmation of service establishes that personal delivery was made on January 29, 2016, and the mailing was not made until March 8, 2016, which was well beyond twenty days and therefore fails to meet the strict requirements of CPLR 308(2) (see *New York State Higher Educ. Services Corp. v. Palmeri*, 167 A.D.2d 797 [3rd Dept. 1990]).

Accordingly, the Journal News defendants established entitlement to dismissal of the complaint pursuant to CPLR 3211(a)(8). In opposition to the motion, plaintiff fails to submit sufficient evidence to demonstrate that jurisdiction over the defendants Lee Higgins, Mike Zacchio, Jorge Fitzgibbon, Hoa Nguyen, Mike Dougherty, and Janet Hasson was obtained through proper service of process. Accordingly, the complaint is dismissed, pursuant to CPLR 3211(a)(8), insofar as asserted against them for failure to effectuate proper service and no evidentiary hearing is required.

Failure to State a Cause of Action

On a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) for failure to state a cause of action, "the court must liberally construe the complaint, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Minovici v. Belkin BV*, 109 AD3d 520 [2nd Dept 2013]; see *Leon v. Martinez*, 84 NY2d 83, 87–88 [1994]; *Treeline 990 Stewart Partners, LLC v. RAIT Atria, LLC*, 107 AD3d 788, 791 [2nd Dept 2013]). "To state a cause of action to recover damages for defamation, a plaintiff must allege that the defendant published a false statement, 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" (*Rodriguez v. Daily News, L.P.*, 142 AD3d 1062, 1063 [2nd Dept. 2016]; see also *Brady v. Gaudelli*, 137 AD3d 951 [2nd Dept. 2016]).

The Journal News defendants argue that the alleged defamatory publications were reports of an official proceeding and therefore, the defamation claims asserted against them are barred by the fair report privilege set forth in Civil Rights Law § 74. Accepting every allegation of the complaint as true, plaintiff fails to state a cause of action against the Journal News defendants.

Here, the articles published in the Journal News were privileged pursuant to Civil Rights Law § 74 which provides, in pertinent part, that "[a] civil action cannot be maintained . . . for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding" (*Rodriguez v Daily News, L.P.*, 142 A.D.3d at 1063). The investigation into the false transcripts at Westchester Community College by the Westchester County Community College itself, the Westchester County District Attorney's Office, and the New York State Inspector General's office, as well as the termination of plaintiff's employment as reported by the college's official spokesman, constituted an "official proceeding" under the statute (see *Freeze Right Refrig. & A.C. Servs. v. City of New York*, 101 AD2d 175, 182 [1st Dept. 1984]).

Notably, the announcement of an investigation by a public agency, made before the formal investigation has begun, as well as the report of an ongoing investigation are protected as a report of an official proceeding within the contemplation of the statute as long as the report is accurate (see *Freeze Right Refrigeration & Air Conditioning Services, Inc. v. New York*, 101 AD2d at 182). The Journal News defendants published articles which accurately quoted defendant Patrick Hennessey, the Director of Communications at Westchester Community College, who stated that plaintiff had been discharged because he was involved in doctoring the transcript of a former player. There is no

assertion that Mr. Hennessey did not make such statements to the Journal News defendants. In fact, the complaint alleges the contrary.

Based upon the foregoing, the complaint is dismissed against Gannett Satellite Information Network, LLC, Lee Higgins, Mike Zacchio, Jorge Fitzgibbon, Hoa Nguyen, Mike Doherty, and Janet Hasson, pursuant to CPLR § 3211(a)(7) for failure to state a cause of action.

Plaintiff's Cross Motion to Amend

"In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Bernardi v. Spyrtos*, 79 AD3d 684, 688 [2nd Dept. 2010]; CPLR 3025[b]; see also *Lucido v. Mancuso*, 49 AD3d 220 [2nd Dept. 2008]). Applications for leave to amend pleadings under CPLR § 3025(b) do not require an evidentiary showing of merit (see *Edwards v. 1234 Pac. Mgt., LLC*, 139 AD3d 658 [2nd Dept. 2016]).

Plaintiff asserts that since the summons and complaint were filed and served, new events have arisen including the indictment of the defendant Tyrone Mushatt. The proposed amendment asserts a cause of action for punitive damages. Plaintiff's cross motion to amend the complaint is granted to the extent of the remaining defendants. The proposed amended complaint annexed to the motion papers as Exhibit A shall be served upon the remaining defendants within 30 days of the date of this order and defendants shall answer the amended complaint pursuant to the CPLR.

Summary

Accordingly, the Journal News defendants' motion to dismiss the complaint insofar as asserted against them is GRANTED; that branch of the plaintiff's cross motion to reserve the Journal News defendants is DENIED as academic; and that branch of the plaintiff's cross motion to amend the complaint is GRANTED as to the remaining defendants and DENIED as to the Journal News defendants.

The parties are directed to appear in the Preliminary Conference Part on February 27, 2017 room 800 at 9:30 a.m. for further proceedings.

Dated: White Plains, New York
January 23, 2017



HON. WILLIAM J. GIACOMO, J.S.C.