State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: December 31, 2020 531049

MICHAEL A. KOPLINKA-LOEHR,
Appellant,
v MEMORANDUM AND ORDER

COUNTY OF TOMPKINS et al.,
Respondents.

Calendar Date: November 17, 2020

Before: Egan Jr., J.P., Aarons, Pritzker and Colangelo, JJ.

Allen & Maines, Ithaca (Russell E. Maines of counsel), for appellant.

Jonathan Wood, County Attorney, Ithaca (William Troy III of counsel), for respondents.

Egan Jr., J.P.

Appeals from two orders of the Supreme Court (McBride, J.), entered January 22, 2020 and January 31, 2020 in Tompkins County, which, among other things, partially granted defendants' motion to dismiss the second amended complaint.

In February 2018, plaintiff was offered a position as a transportation analyst with defendant Ithaca-Tompkins County Transportation Council. Plaintiff accepted the position; however, on March 2, 2018, prior to his proposed start date, the Transportation Council rescinded the job offer. In June 2018, plaintiff commenced this action against defendant County of Tompkins and defendants John Does 1-10, alleging causes of

action for wrongful termination/tortious interference with contract, breach of an employment contract, negligent hiring and ratification of tortious and wrongful conduct. The County moved to dismiss the complaint against it, arguing that the action was premature since plaintiff had failed to comply with its prior demand for examination pursuant to General Municipal Law § 50-h (5). Plaintiff thereafter filed an amended complaint as of right (see CPLR 3025 [a]), adding the Transportation Council as a defendant and simultaneously withdrawing its four state tort claims and replaced them with two constitutional claims, including a federal due process claim.

The County and the Transportation Council (hereinafter collectively referred to as the County defendants) moved to dismiss the amended complaint for failure to state a cause of action (see CPLR 3211 [a] [7]). Plaintiff opposed the motion and cross-moved to consolidate the action with a second, separate action that it had commenced against the County and John Does 1-10, stemming from the same underlying incident.[1] In October 2018, Supreme Court (Reynolds Fitzgerald, J.) denied the County defendants' motion to dismiss and granted plaintiff's cross motion to the extent of "consolidating" the two pending actions for purposes of discovery.[2] The County defendants subsequently answered and discovery ensued.

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[1] Following plaintiff's appearance at a General Municipal Law § 50-h hearing with regard to this incident, he commenced a second action against the County and John Does 1-10, alleging nearly identical tort claims as those set forth in his original June 2018 complaint.

[2] Although the subject actions were purportedly consolidated, it appears that they were joined solely for purposes of discovery, as the actions thereafter proceeded with separate captions and index numbers (see e.g. Roman Catholic Diocese of Albany v Vullo, 185 AD3d 11, 15 n 5 [2020], appeal dismissed and lv denied ___ NY3d ___ [Nov. 24, 2020]). To that end, plaintiff's second action is not part of the instant appeal.

On February 5, 2019, plaintiff moved for leave to file a second amended complaint, seeking to add defendant Martha Robertson, the chair of the Tompkins County Legislature, as a named defendant. On June 4, 2019, Supreme Court (McBride, J.) granted plaintiff's motion and, on August 21, 2019, plaintiff filed the second amended complaint, asserting a constitutional due process cause of action against all defendants (first cause of action) and three additional causes of action against Robertson, including two defamation causes of action (second and third causes of action) and a cause of action for tortious interference with a prospective economic opportunity (fourth cause of action). In September 2019, defendants moved to dismiss the second amended complaint, arguing that the defamation causes of action against Robertson were time-barred.[3] Plaintiff opposed the motion and cross-moved to, among other things, have the second amended complaint deemed timely as against Robertson, arguing, as relevant here, law office failure or, alternatively, that the relation back doctrine was applicable. By order entered January 22, 2020, Supreme Court partially granted defendants' motion to dismiss the second amended complaint, determining that "the defamation claim against [Robertson]" was untimely as it was commenced beyond the applicable one-year statute of limitations, and denied plaintiff's cross motion. Defendants thereafter sought clarification of Supreme Court's order and, by order entered January 31, 2020, Supreme Court clarified that plaintiff's second, third and fourth causes of action against Robertson were dismissed. Plaintiff appeals from both January 2020 orders.

Plaintiff initially contends that Supreme Court erred in dismissing his fourth cause of action against Robertson for tortious interference with prospective economic opportunity as it was timely commenced within the applicable statute of limitations. We agree. As relevant here, a defamation cause of

[3] The motion to dismiss was filed on behalf of all defendants and requested dismissal of all claims against all defendants. The only argument raised in the motion papers in support of dismissal, however, pertained solely to the expiration of the statute of limitations with respect to plaintiff's defamation claims against Robertson.

action is governed by a one-year statute of limitations (see CPLR 215 [3]) and a tortious interference with prospective economic opportunity is governed by a three-year statute of limitations (see CPLR 214 [4]; Ullmannglass v Oneida, Ltd., 86 AD3d 827, 828 [2011]). "In determining which statute of limitations is applicable to a cause of action, it is the essence of the action and not its mere name that controls" (Ullmannglass v Oneida, Ltd., 86 AD3d at 828 [internal quotation marks and citations omitted]; see Krog Corp. v Vanner Group, Inc., 158 AD3d 914, 919 [2018]).

Although plaintiff's fourth cause of action includes allegations that Robertson made defamatory statements about him, the gravamen of this claim is not reputational injury, but economic injury resulting from Robertson's alleged interference with the job offer previously extended by the Transportation Council. Accordingly, inasmuch as the alleged injury concerns an alleged harm to plaintiff's economic interests, we find that the three-year statute of limitations applicable to a tortious interference with economic opportunity claim applies to plaintiff's fourth cause of action and, as such, Supreme Court erred in dismissing said claim as time-barred (see CPLR 214 [4]; Ullmannglass v Oneida, Ltd., 86 AD3d at 828; Classic Appraisals Corp. v DeSantis, 159 AD2d 537, 537-538 [1990]; compare Ramsay v Mary Imogene Bassett Hosp., 113 AD2d 149, 151-152 [1985], appeals dismissed 67 NY2d 608, 1028 [1986]).

Turning to plaintiff's second and third causes of action alleging defamation, we find that he failed to establish his entitlement to the benefit of the relation back doctrine. "The relation back doctrine permits a [plaintiff] to amend a [complaint] to add a [defendant] even though the statute of limitations has expired at the time of amendment so long as the [plaintiff] can demonstrate three things: (1) that the claims arose out of the same occurrence, (2) that the later-added [defendant] is united in interest with a previously named [defendant], and (3) that the later-added [defendant] knew or should have known that, but for a mistake by [plaintiff] as to the later-added [defendant]'s identity, the proceeding would have also been brought against him or her" (Matter of Sullivan v

Planning Bd. of the Town of Mamakating, 151 AD3d 1518, 1519-1520 [2017] [citations omitted], lv denied 30 NY3d 906 [2017]; accord Matter of Sullivan County Patrolmen's Benevolent Assn., Inc. v New York State Pub. Empl. Relations Bd., 179 AD3d 1270, 1271 [2020]; see CPLR 203 [f]; Buran v Coupal, 87 NY2d 173, 178 [1995]).

Assuming, without deciding, that the third prong of the relation back doctrine was established,[4] with respect to the first prong, plaintiff failed to establish that his defamation claims against Robertson involve the same conduct, transaction or occurrence as that alleged against the County defendants. Plaintiff's defamation claims involve statements made by Robertson in February 2018 that allegedly caused him reputational injury, while plaintiff's due process claim involves allegations that defendants failed to provide him with a fact-finding hearing prior to rescinding his offer of employment. These allegations allege separate injuries, occurring on separate days and, therefore, do not constitute the same conduct, transaction or occurrence for purposes of applicability of the relation back doctrine.

With respect to the second prong, "[u]nity of interest requires a showing that the judgment will similarly affect the proposed defendant, and that the new and original defendants are vicariously liable for the acts of the other" (Belair Care Ctr., Inc. v Cool Insuring Agency, Inc., 161 AD3d 1263, 1269 [2018] [internal quotation marks and citations omitted]). The proposed second amended complaint does not contain any allegations "that there was a jural, or legal, relationship" between Robertson and the County defendants that would render them vicariously liable

[4] Robertson was arguably on notice of the defamation claims against her prior to expiration of the applicable one-year statute of limitations, as she was personally served with plaintiff's February 2019 motion to amend the complaint to add her as a named defendant. Further, the motion papers included a copy of plaintiff's proposed second amended complaint, which asserted three causes of action against her, including the second and third causes of action for defamation presently at issue.

for the acts of the other (id.; see McLaughlin v 22 New Scotland Ave., LLC, 132 AD3d 1190, 1193 [2015]; Matter of Ayuda Re Funding, LLC v Town of Liberty, 121 AD3d 1474, 1475-1476 [2014]).[5] Stated another way, plaintiff failed to establish that the County defendants would be legally responsible for the alleged intentional tortious conduct of Robertson. In that vein, we also reject the assertion that the County's duty to defend requires a finding that it is united in interest with plaintiff. In particular, while there is some case law holding that a party with a duty to indemnify is united in interest with its indemnitee (see e.g. DaCosta v City of New York, 296 F Supp 3d 569, 586 [ED NY 2017]; compare Powell v City of New York, 187 AD3d 554, 554 [2020]), there is no authority giving rise to such a finding based solely on a duty to defend. Accordingly, Supreme Court appropriately determined that the relation back doctrine did not apply and properly dismissed, as time-barred, plaintiff's second and third causes of action (see Belair Care Ctr., Inc. v Cool Insuring Agency, Inc., 161 AD3d at 1269).

Finally, we reject plaintiff's claim that he was entitled to relief pursuant to CPLR 2001 and 2005. Supreme Court correctly determined that plaintiff's second amended complaint alleging causes of action for defamation was untimely.[6] Although CPLR 2001 allows the court to correct a mistake in the filing process, it "was not intended to excuse a complete failure to

[5] Nor does plaintiff's reliance on the Code of Tompkins County mandate a different result as it expressly precludes indemnification for a municipal employee's intentional torts.

[6] Plaintiff filed his motion to amend the complaint prior to the expiration of the one-year statute of limitations applicable to his defamation causes of action, effectively tolling the statute of limitations until June 4, 2019, when Supreme Court issued its order granting his motion to amend the complaint. Plaintiff, however, did not thereafter file the second amended complaint until August 21, 2019, well beyond the expiration of the one-year statute of limitations applicable to a defamation cause of action (see generally Schlapa v Consolidated Edison Co. of N.Y., Inc., 174 AD3d 934, 936 [2019]).

file within the statute of limitations," which is exactly what occurred here (Grskovic v Holmes, 111 AD3d 234, 241 [2013]). Further, even assuming such relief were available, plaintiff's temporary, one-day inability to receive email messages did not constitute a sufficient law office failure so as to excuse his failure to timely file his second amended complaint, particularly where, as here, he waited a month and a half following issuance of Supreme Court's June 2019 order before filing same (see Historic Pastures Homeowners Assn., Inc. v Ace Holding, LLC, 167 AD3d 1389, 1391 [2018]; compare Matter of Entergy Nuclear Power Mktg., LLC v New York State Pub. Serv. Commn., 122 AD3d 1024, 1026-1027 [2014]). To the extent not specifically addressed, plaintiff's remaining contentions, including his argument that Supreme Court should have vacated and reissued its June 2019 order (see CPLR 2220 [a]), have been reviewed and found to be without merit.

Aarons, Pritzker and Colangelo, JJ., concur.

ORDERED that the orders are modified, on the law, without costs, by reversing so much there of as granted defendants' motion to dismiss the fourth cause of action in the second amended complaint; motion denied to that extent; and, as so modified, affirmed.

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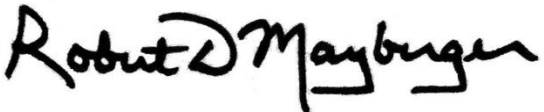

Robert D. Mayberger
Clerk of the Court