IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

RIAD ELSOLH HAMAD,
Plaintiff,

-vs-

Case No. A-06-CA-285-SS

CENTER FOR THE STUDY OF POPULAR CULTURE and DAVID HOROWITZ,
Defendants.

ORDER

BE IT REMEMBERED on the 26th day of June 2006, the Court reviewed the file in the above-styled cause, and specifically Defendant Center for the Study of Popular Culture's Rule 12 Motion to Dismiss [#5], Defendant David Horowitz's Joinder in Rule 12 Motion to Dismiss [#6], Plaintiff's Response to Defendant's Motion to Dismiss [#9], Defendants' Supplemental Brief in Support of Rule 12 Motion to Dismiss [#19], Plaintiff's Response to Defendants' Motion to Dismiss [#21], and Plaintiff's Original, First Amended and Second Amended Complaints [#1, 8, 12].[1]

---

[1] Although the pro se Plaintiff failed to file a motion for leave to amend his complaint as required by Federal Rule of Civil Procedure 15, the Court will examine Defendants' Motion to Dismiss with reference to Plaintiff's Second Amended Complaint. The Court notes that it has the power to strike both of Plaintiff's amended complaints because both were filed after a responsive pleading was served and no leave of court nor consent of the adverse party was given here. FED. R. CIV. P. 15(a). After the Court had substantially completed this order, Plaintiff filed yet another amended complaint on June 22, 2006. After reviewing that complaint the only substantial change seems to be the addition of two new defendants, Freerepublic, LLC and Jim Robinson. Because these defendants have not yet been served and the motion to dismiss does not pertain to them, the Court decides this motion to dismiss based on Plaintiff's Second Amended Complaint.

Having considered the complaints, the motion to dismiss, Plaintiff's response, the relevant law, and the case file as a whole, the Court now enters the following opinion and order.

I. Background

Plaintiff Riad Elsolh Hamad filed suit on April 13, 2006 against the Center for Popular Culture and David Horowitz. Defendant Center for the Study of Popular Culture (the "Center") filed an answer and a Motion to Dismiss on May 18, 2006, which was joined by Defendant Horowitz on May 22, 2006. On May 30, 2006, Hamad filed a First Original Amended Complaint [#8] and a Response to Defendants' Motion to Dismiss [#9]. Then on June 2, 2006, Hamad amended his complaint again by filing his Second Amended Complaint [#12]. In both of his amended complaints [#8, 12], Hamad named additional defendants and also added and removed various claims from his petition. At present, the number of defendants has grown to ten, although Plaintiff has only successfully executed service upon David Horowitz to date.

In his Second Amended Complaint, Hamad brings over twenty claims against the ten defendants. Hamad's claims stem from several online articles he states were published as late as July of 2004. Pl.'s Second Am. Compl. at 3. According to Hamad, these articles contained false information about him, including allegations that he is involved in "illegal violent actions and recruitment for violent and terrorist acts," operates an "Islamic charity," and other "lies, misrepresentation[s] of facts, and libelous statements." *Id.* Furthermore, he alleges the articles were published with the intent to slander and interfere with him personally, his business, and his contract with Austin Independent School District. *Id.*

In particular, Hamad asserts that Defendant David Horowitz is the Editor in Chief of an online magazine named Frontpagemag.org, and that the Center for the Study of Popular Culture is

the sponsor or publisher of the online magazine. Hamad asserts Defendants published an article "currently on their website and available to the public," which contains "libelous statements and fabricated allegations regarding Plaintiff, his business dealings, moral character, religious beliefs, and his religious, social, and political . . . association." *Id.* at 4. The Center admits that David Horowitz is the Editor in Chief of the online publication FrontPage Magazine located at www.frontpagemag.com, and admits that the Center publishes FrontPage Magazine. Orig. Answer at 2. The Center admits it published a single article referring to Plaintiff, Riad Hamad, which was written by Joe Kaufman and published on June 16, 2003 in FrontPage Magazine. *Id.* Although Hamad himself did not include a copy of the article he complains of, the Center has attached a copy of the article as Exhibit 1 to its Answer.

Defendants the Center and David Horowitz move to dismiss all of Hamad's claims under Rule 12. Defendants assert that Hamad's constitutional violation claims should be dismissed because Defendants are not state actors and that Hamad's defamation claims should be dismissed because they are barred by the statute of limitations.

II. Analysis

In deciding whether to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, "the Court must take the factual allegations as true, resolving any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff." *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). The Court should then dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

Even assuming, arguendo, that Plaintiff has stated any cognizable claims against the Center and Horowitz, Plaintiffs claims are barred by limitations. The article underlying Plaintiffs' complaint was first published on June 16, 2003. Orig. Answer, Ex. 1. While a Rule 12(b)(6) motion is generally decided based on the face of the complaint, the Court may also consider an undisputedly authentic document that the defendant attaches to the motion to dismiss, when a plaintiff's claims are based on that document. *Brock v. Baskin-Robbins USA Co.*, 113 F. Supp. 2d 1078, 1092 (E.D. Tex. 2000). Although Plaintiff has not provided any specific date that the Frontpagemag.org article ran in any of his pleadings, neither has he contested that the article ran on June 16, 2003, nor the authenticity of the article attached as an exhibit to Defendant's Answer. Hamad seems to admit that the article on the Center's website was published more than three years ago. Pl.'s Second Am. Compl. at 5.[2]

In Texas, the limitations period for libel and slander claims is one year. TEX. CIV. PRAC. & REM. CODE § 16.002. Texas applies the "single publication" rule in libel cases, which means the statute of limitations begins to run, on the last day of mass distribution to the public. *Stephenson v. Triangle Publ'n, Inc.*,104 F. Supp. 215, 216 (S.D. Tex. 1952); *Williamson v. New Times, Inc.*, 980 S.W.2d 706, 710 (Tex. App.—Fort Worth 1998, no pet.). The rationale behind the single publication rule is that on the final date of distribution, "the publisher, editors and authors have done all they can to relinquish all right of control, title and interest in the printed matter." *Holloway v. Butler,* 662 S.W.2d 688, 690 (Tex. App.—Houston 1983, writ ref'd n.r.e.). Furthermore, the rule provides for

---

[2] Hamad also states that it has been less than two years since MilitantIslammonitor.org published their article, although he never states the specific date or title of that article. Pl.'s Second Am. Compl. at 5. Because only the Center and David Horowitz bring this motion to dismiss, the Court will not consider here the applicability of the statute of limitations defense to other Defendants in this order.

certainty regarding the limitations tolling date; otherwise, publishers would have to worry about "continually extended limitations periods based upon retail sales or secondary distributions of the printed matter." *Id.* In *Holloway*, the Court of Appeals rejected the argument that limitations should begin to run when the allegedly libelous article "is removed from circulation." *Id.* at 692.

When applied to online publications, such as this one, the single publication rule provides that limitations begin to run from the date an article is first posted and made available to the public on the internet. *Van Buskirk v. The New York Times*, 325 F.3d 87, 89 (2d Cir. 2003); *Firth v. New York*, 775 N.E.2d 463, 465–67 (N.Y. 2002). Each court to address this question has reached the same conclusion: the statute of limitations begins to run when an article is first posted on the internet. *See, e.g., McCandliss v. Cox Enters., Inc.*, 593 S.E.2d 856, 858 (Ga. App. 2004); *Traditional Cat Ass'n, Inc. v. Gilbreath*, 13 Cal. Rptr.3d 353, 361–404 (Cal. App. 2004); *Lane v. Strang Commc'ns Co.*, 297 F. Supp. 2d 897, 899–900 (N.D. Miss. 2003).

Thus, Hamad had one year from June 16, 2003, that is until June 16, 2004, to file timely file his complaint for libel and slander against Defendants the Center and Horowitz. TEX. CIV. PRAC. & REM. CODE § 16.002. Hamad did not file his original complaint [#1] until April 13, 2006. Therefore, his claims for libel, slander, and defamation are barred by the statute of limitations.[3] The Court also notes that Hamad has not demonstrated he is entitled to equitable tolling of the limitations period. Hamad simply complains that a one year statute of limitations for libel, slander, and

---

[3] Defamation is the act of injuring a person's reputation by making a false statement. Defamation can occur in two ways: by libel or slander. Libel is the written form of defamation, codified in TEX. CIV. PRAC. & REM. CODE § 73.00. Slander is the spoken form of defamation, which is not codified in Texas, but is recognized at common law. *Cain v. Hearst Corp.*, 878 S.W.2d 577, 580 (5th Cir. 1994). The one year statute of limitations for libel and slander applies to the following of Plaintiff's claims: "Libel and Slander, Malicious Libel, Malicious Slander, Defamation of Character, Defamation of Character With Intent To Cause Mental Anguish." Pl.'s Second Am. Compl. at 1–2.

defamation is "incompatible with the new technological developments in the media and publications," and "[t]he House and the Senate of the State of Texas failed to remedy this issue a decade after the development of the Internet information technology." Pl.'s Second Am. Compl. at 5–6. This Court is not convinced by Plaintiff's claims and is charged with applying the laws enacted by the State of Texas, whether the Plaintiff agrees with them or not. Accordingly, Hamad's libel, slander, and defamation claims will be dismissed.

Plaintiff's Second Amended Complaint adds a number of new causes of action; however, a Plaintiff may not creatively plead non-defamation cause of action and thereby avoid the one year statute of limitations. Texas courts have held that the one year statute of limitations for libel applies to any claim wherein the primary complaint is injury to reputation, humiliation, and mental anguish from allegedly false publications. *Williamson*, 980 S.W.2d at 710–11. However, even if Plaintiff's claim was characterized as "business disparagement," he would still be barred by the two year statute of limitations applicable to such actions, which would have ended on June 16, 2005. TEX. CIV. PRAC. & REM. CODE § 16.003(a); *Newsom v. Brod*, 89 S.W.3d 732, 734 (Tex. App.–Houston [1st Dist.] 2002, no pet.). Therefore, Plaintiff's claims for "Libeling and Slandering a Business Name, Defamation through Fraud of a Business Name, Interference With a Business Contract, Tortious Interference With A Business Contract, Conspiracy to Interfere With A Business Contract, Disparagement of a Business Name, Disparagement of Products, Tortious Interference With Prospective Business Advantage" are barred by the two-year statute of limitations.

As to Hamad's miscellaneous "commerce claims" against Defendants, which include "Interference With Interstate Commerce, Conspiracy To Interfere With Interstate Commerce, Interference With Internet Commerce, [and] Conspiracy to Interfere With Internet Commerce," the

Court will dismiss these claims because Defendants the Center and Horowitz are not state actors. *Dennis v. Higgins*, 498 U.S. 439, 446 (1991) ("[I]ndividuals injured by *state action* that violates . . . the Commerce Clause may sue and obtain injunctive and declaratory relief.") (emphasis added).

Finally, Hamad raises a variety of other tort claims and a violation of the Federal Dilution Act claim under 15 U.S.C. § 1125(c). Hamad's claim for "Intentional Infliction of Mental Anguish And Anxiety With The Intent to Injure," construed as a claim for intentional infliction of emotional distress, is dismissed as barred by limitations under a two year statute of limitations and alternatively for failure to state a claim. TEX. CIV. PRAC. & REM. CODE § 16.003(a). Likewise, any claims Hamad has for invasion of privacy, negligence, or gross negligence are barred by a two year statute of limitations. TEX. CIV. PRAC. & REM. CODE § 16.003(a); *see Stevenson v. Koutzarov*, 795 S.W.2d 313, 319 (Tex. App.–Houston [1st Dist.] 1990, writ denied) (applying two year statute of limitations to an invasion of privacy action). Hamad's claims of fraud and under the Federal Dilution Act would not necessarily be barred by the statute of limitations; however, Hamad has not alleged the necessary elements of either cause of action and therefore the Court dismisses these claims for failure to state a claim.[4]

---

[4] For example, Hamad has not alleged Defendants made any representation to him, nor that they intended him to act on it. *See Ernst & Young v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001) (setting forth the elements for a cause of action for fraud). Likewise, Hamad's claim under the Federal Trademark Dilution Act 15 U.S.C. § 1125(c) fails to state a claim because he has not asserted that any trademark or "famous mark" is involved in this case.

III. Conclusion

In accordance with the foregoing:

IT IS ORDERED that Defendant Center for the Study of Popular Culture and David Horowitz's Rule 12 Motion to Dismiss [#5,6] is GRANTED as to limitations and for failure to state a claim;

IT IS FURTHER ORDERED that Plaintiff Riad Hamad's claims against Defendants Center for the Study of Popular Culture and David Horowitz are DISMISSED WITH PREJUDICE;

IT IS FURTHER ORDERED that Plaintiff's Motion for a Partial Summary Judgment, to Set a Trial Date, and for an Injunction [#26] is DENIED;[5] and

IT IS FINALLY ORDERED that Plaintiff's Request for a Hearing [#22] is DENIED.

SIGNED this the 26th day of June 2006.

Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE

[5] The Court once again points out that the only properly served Defendants in this action are David Horowitz and the Center for Popular Culture. The Court has herein dismissed all claims against these two defendants. It is impossible for the Court to grant Plaintiff's Motion for Partial Summary Judgment against the remaining Defendants who have not been properly served to date.