

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D21375
G/kmg

_____AD3d_____

Argued - November 14, 2008

WILLIAM F. MASTRO, J.P.
ANITA R. FLORIO
RANDALL T. ENG
CHERYL E. CHAMBERS, JJ.

2007-10153

DECISION & ORDER

Justin D. Tomasino, etc., respondent,
v American Tobacco Company, et al.,
defendants, Lorillard Tobacco Company,
et al., appellants.

(Index No. 27182/97)

Greenberg & Traurig, LLP, New York, N.Y. (Robert J. Kirshenber, Alan Mansfield, and Israel Rubin of counsel), for Lorillard Tobacco Company; Winston & Strawn, LLP, New York, N.Y. (Thomas J. Quigley, Jennifer L. Malin, and Kara L. Gorycki of counsel), for appellant Philip Morris Incorporated and the Council for Tobacco Research-USA, Inc; Jones Day, New York, N.Y. (Harold K. Gordon and Daniel L. Russo of counsel), for appellant R.J. Reynolds Tobacco Company; Chadbourne & Parke, LLP, New York, N.Y. (David L. Wallace of counsel), for appellant Brown & Williamson Tobacco Corporation; Seward & Kissel, LLP, New York, N.Y. (Jack Yoskowitz and Walter Naeder of counsel), for appellant the Tobacco Institute Inc.; Kasowitz, Benson, Torres & Friedman LLP, New York, N.Y. (Julie R. Fischer of counsel), for appellants Liggett Group, Inc., Brooke Group, Ltd., and Liggett & Myers Tobacco Company (one brief filed).

Finz & Finz, P.C., Jericho, N.Y. (Jay L. Feigenbaum of counsel), for respondent.

In an action, inter alia, to recover damages for personal injuries, etc., the defendants Lorillard Tobacco Company, Philip Morris Incorporated, R.J. Reynolds Tobacco Company, Brown & Williamson Tobacco Corporation, the Tobacco Institute, Inc., and the Council for Tobacco Research-USA, Inc., appeal, as limited by their brief, from so much of an order of the Supreme Court, Nassau County (Martin, J.), entered September 24, 2007, as denied that branch of their motion

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which was for leave to amend their respective answers to assert the defense of res judicata with respect to the plaintiff's punitive damages claims, and the defendants Liggett Group Inc., Brooke Group, Ltd., and Liggett & Myers Tobacco Company, appeal, as limited by their brief, from so much of the same order as denied that branch of their separate motion which was for leave to amend their answer to assert the defense of res judicata with respect to the plaintiff's punitive damages claims.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, those branches of the appellants' motions which were for leave to amend their respective answers to assert the defense of res judicata with respect to the plaintiff's punitive damages claims are granted, and the proposed amended answers are deemed served.

Leave to amend an answer to assert an affirmative defense generally should be granted where the proposed amendment is neither palpably insufficient nor patently devoid of merit, and there is no evidence that it would prejudice or surprise the opposing party (*see* CPLR 3025[b]; *Matter of Roberts v Borg*, 35 AD3d 617; *Public Adm'r of Kings County v Hossain Constr. Corp.*, 27 AD3d 714).

The Supreme Court denied those branches of the appellants' motions which were for leave to amend their respective answers to assert the affirmative defense of res judicata with respect to the plaintiff's punitive damages claims, upon concluding that the defense is patently devoid of merit.

Contrary to the Supreme Court's conclusion, the proposed defense of res judicata in this case is neither palpably insufficient nor patently devoid of merit (*see Fabiano v Philip Morris Inc.*, 54 AD3d 146). Furthermore, the plaintiff failed to demonstrate that he would be prejudiced or surprised by the proposed amendment.

Accordingly, the Supreme Court should have granted those branches of the appellants' separate motions which were for leave to amend their respective answers to assert the defense of res judicata with respect to the plaintiff's punitive damages claims.

MASTRO, J.P., FLORIO, ENG and CHAMBERS, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court