

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

D22930
W/prt

_____AD3d_____

Argued - January 21, 2009

ROBERT A. SPOLZINO, J.P.
JOSEPH COVELLO
RUTH C. BALKIN
ARIEL E. BELEN, JJ.

2008-00042

DECISION & ORDER

Robert J. Congel, et al., respondents,
v Marc A. Malfitano, appellant.

(Index No. 220/07)

Sonneborn, Spring & O’Sullivan, P.C., Syracuse, N.Y. (James L. Sonneborn of counsel), for appellant.

Corbally, Gartland and Rappleyea, LLP, Poughkeepsie, N.Y. (Vincent L. DeBiase, Paul F. Ware Jr., P.C., Jennifer L. Chunias, and Goodwin Procter LLP [Anthony S. Fiotto], of counsel), for respondents.

In an action, inter alia, to recover damages for breach of contract and breach of fiduciary duty and for a judgment declaring that the defendant wrongfully dissolved the Poughkeepsie Galleria Company Partnership, the defendant appeals from an order of the Supreme Court, Dutchess County (Pagones, J.), dated November 28, 2007, which granted the plaintiffs’ motion to confirm a referee’s report awarding them costs and disbursements pursuant to CPLR 6514(c) in the sum of \$37,130 and directed the defendant to pay a referee’s fee in the sum of \$4,466, and granted the plaintiffs’ separate motion pursuant to CPLR 3025(b) for leave to amend the complaint.

ORDERED that the order is modified, on the law, by deleting the provisions thereof granting the plaintiffs’ motion to confirm the referee’s report and directing the defendant to pay the referee’s fee and substituting therefor provisions denying that motion and directing the plaintiffs to pay one half of the referee’s fee and the defendant to pay one half of the referee’s fee; as so modified, the order is affirmed, without costs or disbursements.

Contrary to the defendant’s contention, in granting leave to amend the complaint to

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add a cause of action alleging trade libel, the Supreme Court properly concluded that that cause of action was pleaded with particularity (*see* CPLR 3016[a]; *cf. Fusco v Fusco*, 36 AD3d 589, 591). The defendant's contention that the language quoted in the complaint is not defamatory is improperly raised for the first time in his reply brief (*see Borbeck v Hercules Constr. Corp.*, 48 AD3d 498, 499; *Cappiello v Johnson*, 21 AD3d 921, 922).

The Supreme Court improperly granted the plaintiffs' motion to confirm a referee's report awarding them costs and disbursements and improperly directed the defendant to pay all of the referee's fee. The plaintiffs should have been directed to pay one half of the referee's fee (*see Congel v Malfitano*, _____AD3d_____ [Appellate Division Docket No. 2007-04386; decided herewith]).

SPOLZINO, J.P., COVELLO, BALKIN and BELEN, JJ., concur.

ENTER:



James Edward Pelzer
Clerk of the Court