

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART 32

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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VICTOR OLTEANU,

Plaintiff,

- against -

Index No. **32556/2020E**

Hon. **FIDEL E. GOMEZ**
Justice

**MOTEK GROUP NY LLC a/k/a MOTEK
GROUP LLC, JOE MASHIEH, OREN
KRAIEM, DENNIS HOME INSPECTION
LLC, SEYUN BACH, and AMIRIAN,
SOLEIMAN & ASSOCIATES, LLP,**

Defendants.

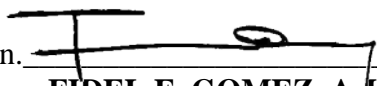
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The following papers numbered 1 to 3, read on this motion, noticed on 4/1/2022, and duly submitted as no. 4 on the Motion Calendar of 4/1/2022.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	

Non-Parties Motek Group LLC and Joe Mashieh's motion is decided in accordance with the Decision and Order annexed hereto.

Dated: _____
5/20/22

Hon. 
FIDEL E. GOMEZ, A.J.S.C.

1. CHECK ONE..... CASE DISPOSED NON-FINAL DISPOSITION
2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER DO NOT POST
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT
 NEXT APPEARANCE DATE: _____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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VICTOR OLTEANU,

Plaintiff,

DECISION AND ORDER

- against -

Index No. **32556/2020E**

**MOTEK GROUP NY LLC a/k/a MOTEK
GROUP LLC, JOE MASHIEH, OREN
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Defendants.

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Non-Parties Motek Group, LLC and Joe Mashieh (the “Non-Parties”) move for an order dismissing this action pursuant to CPLR 3211(a)(1) and (a)(7). The Non-Parties also seek to be removed from the caption as defendants, and to have references to them as defendants stricken from the Second Amended Verified Complaint (the “Second Complaint”). Plaintiff Victor Olteanu (“Plaintiff”) opposes, arguing that the motion is frivolous and a waste of judicial resources. Plaintiff also seeks sanctions pursuant to 22 NYCRR 130-1.1(c)(2).

For the reasons which follow, the Non-Parties’ motion is granted, in part. Plaintiff’s request for sanctions is denied.

BACKGROUND:

On October 27, 2020, Plaintiff commenced the instant action against Defendants by filing a summons and verified complaint.

On January 19, 2022, the Court (McShan, J.) issued a Decision and Order dismissing this action in its entirety against the Non-Parties (Plaintiff’s Exhibit 1, p. 13-14).

On March 3, 2022, Plaintiff filed its Second Complaint.

On March 18, 2022, the Non-Parties filed the instant motion. On April 1, 2022, the motion was marked fully submitted.

DISCUSSION:

The Non-Parties' Motion to Dismiss:

The Non-Parties move to dismiss this action against them pursuant to CPLR § 3211(a)(1) and (a)(7). They argue that although the Court dismissed all claims against them by Decision and Order dated January 19, 2022, Plaintiff's Second Complaint continues to list them on the caption and to refer to them as defendants. The Non-Parties seek to confirm their prior dismissal and status as non-parties. They also seek to be removed from the caption as defendants, and to remove any references to them as defendants from the Second Complaint.

CPLR 3211(a) provides, in relevant part, that: "*A party* may move for judgment dismissing *one or more causes of action asserted against him* on the ground that: 1. a defense is founded upon documentary evidence; or . . . 7. the pleading fails to state a cause of action." (emphasis added).

Here, there is no dispute that this action was dismissed in its entirety against the Non-Parties by Decision and Order dated January 19, 2022. As such, the Non-Parties are not parties to this action. Moreover, a review of the Second Complaint demonstrates that Plaintiff does not allege any causes of action against the Non-Parties or seek any relief against them (NYSCEF Doc. No. 119). Accordingly, the Non-Parties' motion to dismiss the Second Complaint as against them pursuant to CPLR 3211(a)(1) and (a)(7) is denied as moot.

However, the Non-Parties' motion to be removed from the caption as defendants is granted pursuant to CPLR 305(c). Since this action was dismissed against the Non-Parties, they must be removed from the caption (CPLR 305[c] ["At any time, in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced"]; *Comprehensive Care of New York, P.C. v Romero*, 56 AD3d 510, 510 [2d Dept 2008] ["[T]he Supreme Court should have granted that branch of the cross-motion which was to amend the caption pursuant to CPLR 305(c) to delete the name of Manuel A. Romero, individually, as a defendant. In a prior order dated November 4, 2002, Romero's motion to dismiss the complaint insofar as asserted against him for lack of personal jurisdiction was granted"]). In any case, Plaintiff does not object to the removal of the Non-Parties from the caption.

The Non-Parties do not identify any rule pursuant to which they seek to have removed or strike references to them as defendants from the Second Complaint. The only rule pursuant to which parties may move to strike allegations in a pleading is CPLR 3024(b) (Patrick M. Connors,

Practice Commentaries, McKinney’s Cons Laws of NY, CPLR C3024:4 [“The motion under CPLR 3024(b) is the sole surviving motion to ‘strike’ under the CPLR. The various others of prior law are gone”]. CPLR 3024(b) provides that: “A party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading”.

“Whether to strike allegedly scandalous or prejudicial matter from a pleading in a given instance is left to the discretion of the trial court” (*Pisula v Roman Catholic Archdiocese of New York*, 201 AD3d 88, 97 [2d Dept 2021]). Moreover, “[w]hat qualifies as scandalous or prejudicial matter in a given complaint is sui generis” (*id.* at 96).

CPLR 3024(b) presents an instance where courts must engage in weighing and evaluating the competing interests of parties, by examining the relevance of allegations in pleadings against any scandalousness or prejudice occasioned by the allegations. The statute involves, in effect, a two-part test. The first part is whether the allegation that a party seeks to strike is, in fact, scandalous or prejudicial. If the nature and content of an allegation is not actually scandalous or prejudicial, the court’s analysis ends quickly and there is nothing to strike from the pleading. . . . Indeed, even the most prolix complaint that is chock-full of unnecessary and irrelevant allegations is not subject to any motion to trim the pleading to its necessary core – unless the complaint contains allegations that are scandalous or prejudicial.

(*id.* at 99). The Non-Parties do not argue that references to them as defendants in the Second Complaint are scandalous or prejudicial.¹ They merely assert that these references to them as defendants are confusing and seek a confirmation that they are no longer parties to this action.

¹ Contrary to Plaintiff’s arguments, in their moving papers, the Non-Parties merely seek to remove the references to them as defendants, not to have all of the allegations against them stricken from the Second Complaint. However, in reply, the Non-Parties appear to be arguing that the factual allegations against them in the Second Complaint must also be stricken. A party may not make new arguments in reply papers (*Lee v Law Offices of Kim & Bae, P.C.*, 161 AD3d 964, 965 [2d Dept 2018] [“The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds or evidence for, the motion. Here, the plaintiff’s reply papers include new arguments in support of the motion, new grounds and evidence for the motion, and expressly requested relief that was dramatically unlike the relief sought in her original motion. Therefore, those contentions, and the grounds and evidence in support of them, were not properly before the Supreme Court”]; *Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008]; *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]). As such, this argument, submitted in the reply papers for the first time, has not been considered.

Accordingly, the Non-Parties' motion to strike the references to them as defendants in the Second Complaint is denied.

Plaintiff's Request for Sanctions:

Plaintiff seeks sanctions pursuant to 22 NYCRR 130-1.1(c)(2), arguing that the instant motion is frivolous and a waste of judicial resources. Counsel for Plaintiff argues that on February 23, 2022, prior to the Non-Parties' filing of this motion, he confirmed in an email to counsel for the Non-Parties that no claims were being alleged against them (Plaintiff's Exhibit 2). Plaintiff seeks the sum of \$1,662.50 (4.5 hours x hourly rate of \$350) for the time counsel spent in drafting the opposition.

22 NYCRR 130-1.1(a) states, in relevant part, that:

The court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct as defined in this Part. In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct as defined in this Part which shall be payable as provided in section 130-1.3 of this Subpart.

22 NYCRR 130-1.1(c) provides that: "For purposes of this Part, conduct is frivolous if: (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another".

Section (c) also provides that:

Frivolous conduct shall include the making of a frivolous motion for costs or sanctions under this section. In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party.

Here, it does not appear that the motion was made "primarily to delay or prolong the resolution of the litigation or to harass or maliciously injure" Plaintiff. Although the Second

Complaint does not allege any causes of action against the Non-Parties, it continues to list them in the caption, to refer to them as defendants, and makes factual allegations against them. Moreover, the Non-Parties' motion seeks not only dismissal, but other relief as well, such as to be removed from the caption as defendants. The Court notes that Plaintiff does not seek sanctions under any other section.

Accordingly, the Non-Parties' motion is granted only to the extent that the Non-Parties should be removed from the caption as defendants. Plaintiff's request for sanctions is denied.

It is hereby

ORDERED that Plaintiff file and serve a copy of its Second Amended Verified Complaint, removing Motek Group LLC and Joe Mashieh from the caption; and it is further

ORDERED that the Non-Parties serve a copy of this Decision and Order upon all parties, with Notice of Entry, within thirty (30) days of the date hereof.

This constitutes the Decision and Order of this Court.

Dated:

5/20/22

Hon.


FIDEL E. GOMEZ, A.J.S/C.