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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF PART 8

Justice

0111796/2001

FUTURIST 1953, INC.

VS

WESTBETH CORPORATION

INDEX NO. _____

MOTION DATE 6/22/04

SEQ 3

MOTION SEQ. NO. _____

MODIFY

MOTION CAL. NO. 1

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits _____	
Replying Affidavits _____	2

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL - 6 2004
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: JUN 29 2004

_____ J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DONOTPOST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8

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FUTURIST 1952, INC., a/k/a MoDerNist, Inc.,

Plaintiff,

-against-

Index No, 111796/01
Mot. Seq. No. 003

WESTBETH CORPORATION HOUSING DEVELOPMENT FUND COMPANY, INC. and THE BOARD OF DIRECTORS of the Westbeth Corporation Housing Development Fund Company, Inc.,

Defendants.

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DIANE A. LEBEDEFF, J.:

Plaintiff Futurist 1952, Inc., moves for modification of an existing ***Yellowstone*** injunction (see ***First National Stores, Inc. v. Yellowstone Shopping Center, Znc.***, 21 N.Y.2d 630 [1968]) and to amend the complaint.

The ***Yellowstone*** injunction was issued in December of 2001 and was modified on the record as issues arose. It is clear that a court has discretion to modify the conditions incorporated in a ***Yellowstone*** injunction ***(Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates,*** 234 A.D.2d 49, 50 [1st Dept. 19961, **Iv.** dismissed 89 N.Y.2d 1086 [19971, "the court would have power to modify **any prior** arrangement" in its discretion, **based** on changed circumstances, including the passage of time).

There has been a change of circumstances in that an elevator servicing the sixth floor premises at issue has been installed, such that there is no longer **a** peril that visitors

who consume alcohol might fall on the long walk **down** the stairs. Accordingly, the restrictions on the service of alcohol are vacated, as requested.

There are no other changed circumstances and the matter is scheduled for trial in the near future, The legal dispute regarding use of the premises remains a hotly contested issue. The court sees no facts advanced which would alter its assessment of the appropriate fair balance to preserve the pre-existing *status quo* while incorporating several safety restrictions appropriate to use of the premises **as** a place of public assembly, in the manner extensively explored in writing and on the record. Accordingly, the balance of the application for modification of the ***Yellowstone*** injunction is denied.

The plaintiff also seeks permission to amend the complaint. The decision whether to permit an amendment to the complaint is committed to the discretion of the trial court and CPLR 3025 (b) provides that leave to amend pleadings shall be freely granted absent **a** showing of prejudice (*Fahey v. County of* ***Ontario,*** 44 N.Y.2d **934,935** [1978]), or unfair surprise (*Mallory* ***Factor,*** *Inc.* ***v. Schwartz,*** **146** A.D.2d 465,467 [1st Dept. 1989]). The court must also **(a)** examine whether the facts alleged are legally sufficient to establish a ***prima*** *facie* cause of action consistent with the legal theory, and (b) scrutinize any alleged insufficiency or lack of merit ***(Daniels*** *v.* ***Empire Orr,*** 151 A.D.2d **370, 371** [1st Dept. 1989]). The court is not required to "permit futile amendments which may lead to needless litigation" (*Saferstein v.* ***Mideast Systems, Ltd.,*** **143** A.D.2d **82, 83 [2d** Dept. 1988]) **and** should review the proposed amendment "to obviate [that] possibility" (*Sharapata* v. *Town of Islip,* **82** A.D.2d 350,362 **[2d** Dept., Titone, J.], aff'd 56 N.Y.2d 332 [1982]).

The first proposed amendment is a new fifth cause of action for injurious falsehood, based upon the claim that false representations were made to the court at an earlier stage of this proceeding directly bearing upon the issues in this case, which caused special damages. However, there exists an established rule that statements made by parties, attorneys and witnesses in the course of a judicial or quasi-judicial proceeding are absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issues to be resolved in the proceeding (*Mosesson v, Jacob D. Fuchsberg Law Firm*, 257 A.D.2d 381 [1st Dept. 19991, lv den 93 N.Y.2d 808 [1999]; see also, *Herzfeld & Stern v. Beck*, 175 A.D.2d 689,691 [1st Dept. 19911, app dismissed 79 N.Y.2d 914 [1992] and 89 N.Y.2d 1064 [1992]; *Wiener v. Weintraub*, 22 N.Y.2d 330,331-332 [1968]; *Allan and Allan Arts, Ltd. v. Rosenblum*, 201 A.D.2d 136, 139 [2d Dept. 19941, lv app denied 85 N.Y.2d 921 [1995], cert denied 516 U.S. 914 [1995]). This justice recently reviewed the applicable law in *55th Management Corp. v. Goldman*, 1 Misc.3d 239 (Sup. Ct. N.Y. Co. 2003, Lebedeff, J.).

Given that the issues of absolute privilege, relevancy and pertinency were not addressed in the motion, the court denies this request to amend with leave to renew upon proper papers. In addition, analysis of the law of damages applicable to an allegedly wrongfully obtained preliminary injunction would be helpful (see, as a starting point, *Graubard Mollen Horowitz Pomeranz & Shapiro v. 600 Third Ave. Associates*, 93 N.Y.2d 508, 515 [19991).

The second proposed amendment is a new sixth cause of action sounding in *prima facie* tort. "There is no recovery in *prima facie* tort unless malevolence is the sole motive

for defendant's otherwise lawful act or, in Justice Holmes' characteristically colorful language, unless defendant acts from 'disinterested malevolence', by which is meant 'that the genesis which will make a lawful act unlawful must be a malicious one unmixed with any other and exclusively directed to injury and damage of another"' (*Bums Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 333 [1983]; citations omitted). Many of the actions recited in the proposed claim are laid to the cause of inefficiency or not finding papers submitted, rather than to disinterested malevolence. Accordingly, the court denies this request to amend with leave to renew upon proper papers.

The motion is denied except to the extent granted above.

This decision constitutes the order of the court.

Dated: June 29 ,2004

J.S.C.