

Baker v Guardian Life Insurance Co. of America

2004 NY Slip Op 30180(U)

January 26, 2004

Supreme Court, New York County

Docket Number: 0118169/2001

Judge: Barbara Kapnick

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

PRESENT: BARBARA R. KAPNICK

PART 12

0118169/2001

BAKER, THOMAS

VS

GUARDIAN LIFE INSURANCE

SEQ 5

REARGUMENT/RECONSIDERATION

INDEX NO.

118169/01

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

The following papers, numbered 1 to _____, were read at this motion call:

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPLISHING THE SAME BY THE COURT

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

Dated: 1/16/04

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
BARBARA R. KAPNICK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 12

-----X
THOMAS BAKER,

Plaintiff,

-against-

THE GUARDIAN LIFE INSURANCE COMPANY OF
AMERICA, KPMG LLP and JOSEPH SARGENT,

Defendants.

-----X

DECISION/ORDER

Index No. 118169/01
Motion Seq. No. 005

BARBARA R. KAPNICK, J.:

Plaintiff Thomas Baker commenced this action against defendants The Guardian Life Insurance Company of America ("Guardian"), his employer for twenty-five years until his discharge on July 21, 2000, and KPMG LLP, ("KPMG") an outside accounting/auditing and management consulting firm which conducted an audit of Baker's department and issued a report which allegedly contained false and defamatory statements. In his Original Complaint filed under Index No. 123106/00, plaintiff sought to recover damages for alleged defamation (first cause of action), tortious interference with prospective employment or business relations (second cause of action), tortious interference with prospective employment or business relations (third cause of action), and intentional infliction of emotional distress (fourth cause of action).

Plaintiff subsequently served a "First Amended Complaint" naming Joseph Sargent, the President and Chief Executive Officer of Guardian, **as** an additional party defendant and setting forth additional claims for promissory estoppel, breach of contract and unpaid wages and benefits.

Specifically, the "First Amended Complaint" sets forth claims for: defamation against defendants Guardian, KPMG and Sargent (first cause of action); tortious interference with employment or business relations against defendants KPMG and Sargent (second cause of action); tortious interference with prospective employment or business relations against all defendants (third cause of action); promissory estoppel against all defendants (fourth cause of action); breach of contract against defendant Guardian for alleged breaches of said defendant's promises of confidentiality with regard to relations with vendors (fifth cause of action); breach of contract against defendant Guardian based on its alleged failure to pay plaintiff for earned unused vacation (sixth cause of action); unpaid wages and benefits against defendant Guardian (seventh cause of action); and intentional infliction of emotional distress against all defendants (eighth cause of action).

Defendants rejected the "First Amended Complaint" on the ground that it was served without leave of court.

By Decision/Order dated April 14, 2003, which more fully sets forth the complex procedural history of this lawsuit, this Court denied plaintiff's motion for an order compelling defendants to accept service of the First Amended Complaint, finding that the Amended Complaint was filed under the index number of a previously disposed proceeding for pre-action disclosure between the same parties (Index No. **123106/00**) and never filed under the index number of the instant action (Index No. **118169/01**). In addition, this Court granted defendants' motion to dismiss plaintiff's complaint as time-barred by the applicable one-year statute of

limitations since the action was brought more than one year after Baker's termination.

Plaintiff now moves for leave to reargue or, in the alternative, for leave to renew the prior motion for an order compelling defendant⁵ to accept service of the First Amended Complaint on the grounds that the Court incorrectly concluded that the First Amended Complaint was not filed under the correct index number.

Plaintiff further argues that the action should not have been dismissed because the First Amended Complaint (a copy of which was not annexed to the moving papers) alleges that false and defamatory statements contained in the Report were republished and reconveyed by defendants to potential employers continuing into the Fall of 2001, and were contained in an affidavit from Sargent filed on December 8, 2000 in the prior court proceeding. Thus, plaintiff contends that his claim for defamation is not time barred.

Based on the papers submitted and the oral argument held on the record on September 10, 2003, plaintiff's motion for leave to reargue the prior motion is granted.

Although the First Amended Complaint was never filed under the index number of this action, said omission appears to have been an inadvertent error by the Clerk likely caused by the fact that the caption and index number of the prior proceeding was set forth on the First Amended Complaint as well as the caption and index number of the instant action. Accordingly, upon reargument, this Court

finds that the interests of justice require that the First Amended Complaint be deemed filed nunc pro tunc under Index No. 118169/01.

Plaintiff's claim that the alleged defamatory statements were republished to prospective employers is contained in Paragraph 38 of the Amended Complaint which alleges that

Baker's former IT vice-president Joseph Connell, who was fired with Baker, interviewed for a senior position with the firm OSI on May 14, 2001 with OSI President Steve Warren and Steve Tabb. Warren stated that OSI had regular contact with Guardian executives and that they had been told that Tom Baker was "in bed" with some vendors and stole "a lot of money."

However,

(i)t is well settled law that a cause of action sounding in defamation which fails to comply with the special pleading requirements contained in CPLR 3016(a) that the complaint set forth 'the particular words complained of', mandates dismissal (citation omitted). Failure to state the particular person or persons to whom the allegedly defamatory comments were made also warrants dismissal (citations omitted).

Gill v. Pathmark Stores, Inc., 231 A.D.2d 563, 564 (2nd Dep't 1997). See also, Johnson v. Markman, 288 A.D.2d 165 (1st Dep't 2001); Shapiro v. Central General Hospital, 251 A.D.2d 317 (2nd Dep't 1998), lv. to app. den. 92 N.Y.2d (1998); Murganti v. Weber, 248 A.D.2d 208 (1st Dep't 1998)

Neither paragraph 38 nor any other provision of the First Amended Complaint identifies which Guardian executives allegedly made such statement and/or the particular person or persons at OSI to whom the allegedly defamatory comments were made. Thus,

plaintiff's claim of republication is not set forth with the requisite particularity.

In addition, the First Amended Complaint does not contain any timely allegations of defamation against KPMG.

Moreover, the statements made by Sargent in an affidavit submitted during the prior proceeding may not serve as the basis for the imposition of liability for defamation since "an absolute privilege attaches to an oral or written statement made in a judicial proceeding which is pertinent to the proceeding and that the term 'pertinent' has been liberally construed by the courts to attach to any statement that may possibly be or become material or pertinent (citations omitted)." Dachowitz v. Kranis, 61 A.D.2d 783 (2nd Dep't 1978), mot. to dismiss action den. 47 N.Y.2d 773 (1979); See also, Martirano v. Frost, 25 N.Y.2d 505 (1969); Carniol v. Carniol, 288 A.D.2d 421 (2nd Dep't 2001).

Therefore, the first cause of action of the First Amended Complaint for alleged defamation is dismissed.

The second and third causes of action for alleged tortious interference with employment or business relations and with prospective employment or business relations, respectively, merely restate plaintiff's untimely claim for defamation in an attempt to reclassify it as a separate tort and are, therefore, dismissed.


The remainder of plaintiff's claims (which are not briefed by the parties in the papers submitted in connection with this motion) are severed and continued.

Defendants shall serve an Answer or otherwise move with respect to the remaining cause of action in the First Amended Complaint within twenty days of service of a copy of this order with notice of entry.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on March 17, 2004 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: January 16, 2004



 BARBARA R. KAPNICK
 J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
 JAN 22 2004
 COUNTY CLERK'S OFFICE
 NEW YORK