

Locke v Aston

2004 NY Slip Op 30185(U)

October 21, 2004

Supreme Court, New York County

Docket Number: 0605851/2001

Judge: Karla Moskowitz

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

PRESENT: Hon. KARLA MOSKOWITZ PART 03

Justice

-----X

DIANA LOCKE,

Plaintiff,

-against-

SHERRELL J. ASTON, M.D. individually and SHERRELL J. ASTON, M.D., P.C.,

INDEX NO. 605851/2001

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

-----X

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

	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 the motion is decided in accordance with the accompanying Order and Decision.

FILED
 OCT 25 2004
 NEW YORK
 COUNTY CLERK'S OFFICE

Dated: October 21, 2004



 KARLA MOSKOWITZ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 3

-----X
DIANA LOCKE,

Plaintiff,

Index No. 605851/2001

-against-

Decision & Order

SHERRELL J. ASTON, M.D. individually and
SHERRELL J. ASTON, M.D., P.C.,

Defendants.
-----X

KARLA MOSKOWITZ, J:

Defendants move, pursuant to CPLR 3025, for leave to serve an amended counterclaim.

Plaintiff Diana Locke brings this action to recover damages for breach of contract. Locke alleges that, through a series of oral agreements and a written document, the parties agreed to collaborate on a book about plastic surgery.

In their proposed amended counterclaim, defendants allege that Locke, who is a California resident, surreptitiously recorded phone conversations between herself and defendant Sherrell Aston. California Penal Code, section 632 provides that it is a crime for persons in the State of California to record telephone conversations with a non-consenting party. California Penal Code, section 637.2 establishes a civil remedy available to any person who is the victim of an unlawful tape recording. The statutory damages are the greater of \$5,000 per violation or three times the actual damages suffered, if any. Aston seeks damages in the amount of \$5,000 per non-consented to tape.

As a rule, leave to amend is freely granted, absent prejudice or surprise (CPLR 3025 [b]; Inwood Tower, Inc., v City of New York, 60 NY2d 957). The exception to this rule is where the

amendment is clearly without merit (Monteiro v R.D. Werner Co., Inc., 301 AD2d 636).

Locke alleges that the counterclaim is deficient in several respects. First, Locke contends that the statute in issue is only for the protection of Californians. Locke points to a California Supreme Court case in which the Court stated that “[i]n enacting this statute, the legislature declared in broad terms its intent “to protect the right of privacy of the people of this state” (Ribas v Clark, 38 Cal 3d 355, 359). Locke reasons that, because the individual defendant, Dr. Aston, is a citizen and resident of New York and the corporate defendant is a New York corporation, the defendants are not protected under this law. Section 637.2 of the California Penal Code provides that:

(a) *Any person* who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts:

- (1) Five thousand dollars (\$5,000).
- (2) Three times the amount of actual damages, if any, sustained by the plaintiff.

(Emphasis added). Thus, the wording of the statute does not exclude non-residents from bringing suit based upon a violation. Locke provides no case authority for her position that the statute protects only California residents.

Second, Locke points out that the statute only applies to “confidential communications” (California Penal Code § 632 [a]). However, the California Supreme Court has held that the statute is not limited to “secret” conversations or conversations that will never divulged, but that the court is to apply the statute broadly to prohibit “unconsented-to eavesdropping or recording of conversations regardless of whether the party expects that the content of the conversations may later be conveyed to a third party” (Flanagan v Flanagan, 27 Cal 4th 766, 775, 41 P 3d 585,

581).

Third, Locke contends that Aston does not allege that he was unaware that Locke was recording the conversations, or that he did not consent to the recording, but only that he was unaware that Locke was “surreptitiously recording” their conversations (Harris Aff., Ex. A ¶ 92). Locke contends that Aston, in fact, knew of the recordings, and that the above statement could be technically true—that is that Aston did not know of any “surreptitious” recordings. Therefore, Locke contends that the counterclaim is improperly pleaded.

The court interprets words in a pleading by their plain meaning (McMillian v Atlantic Oldsmobile Ltd, 115 AD2d 645). Despite Locke’s attempts to present possible scenarios, I find that the counterclaim is properly pleaded.

Finally, Locke alleges that Aston cannot plead this counterclaim, because New York does not recognize what she did as a tort. Locke points out that, in New York, only one party needs to consent to the recording of a phone conversation for it to be legal. However, “a plaintiff with a transitory cause of action has a wide choice of forums in which to sue.” (Silver v Great American Insurance Co., 29 NY2d 356; Scott v Southern Ry. Co., 282 AD 132). This court sees no reason why Aston’s claim under California law should not proceed here. Plaintiff has chosen New York as her forum for the main action and defendant Aston is a New York resident. Further, this claim does not violate the public policy of New York. New York has its own wiretapping statute, Section 250.05 of the Penal Law (CPL 710.10 [4]) and does not allow use of evidence obtained illegally in civil actions (CPLR 4506 [1]).

Accordingly, based upon the foregoing, it is

ORDERED that defendants’ motion for leave to serve an amended counterclaim in the

form annexed to moving papers is granted; and it is further

ORDERED that the amended pleading shall be deemed served upon service of a copy of this order with notice of entry.

Dated: October 24, 2004



J.S.C.

FILED
OCT 25 2004
NEW YORK
COUNTY CLERK'S OFFICE