

Lewis v Hoyos
2005 NY Slip Op 30613(U)
September 8, 2005
Supreme Court, New York County
Docket Number: 111273/2004
Judge: Karen S. Smith
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 44

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JENNIFER A. LEWIS,

Plaintiff,

-against-

Index no.: 111273/2004

Motion seq.: 006

Motion date: July 8, 2005

HECTOR HOYOS and MANHATTAN
PICTURES INTERNATIONAL, LLC,

DECISION AND ORDER

Defendants.

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PRESENT: KAREN S. SMITH, J.S.C.:

Motion by the defendant, Manhattan Pictures International, LLC (hereinafter referred to as "MPI"), for leave to renew its prior motions to dismiss the fourth cause of action set forth in the complaint herein is denied. Cross-motion by plaintiff, Jennifer A. Lewis (hereafter referred to as "Lewis") for; (a) leave to renew/reargue this court's order dated November 15, 2004, (b) leave to amend her complaint to assert a new cause of action against MPI for deceptive business practices and (c) to direct MPI to produce Joel Seiden and Paul Manafort for deposition is denied.

Lewis's complaint alleges, *inter alia*, that; (1) she was sexually assaulted by defendant Hector Hoyos (hereafter referred to as "Hoyos") at a private home in Canada, (2) Hoyos was an employee, officer, member or director of defendant MPI, (3) Hoyos invited Lewis to the home in order to assist Hoyos in writing a screenplay for a project to be produced by the defendants and shown on HBO television, (4) after the assault, Lewis's arm was injured due to Hoyos's negligence and Hoyos took her to a hospital in Canada to treat her arm, (5) after Lewis flew back

to the United States, she received further medical treatment and reported the incident to the Quebec police and, (6) defendant MPI was negligent because it was aware of Hoyos' history of sexual misconduct as well as his propensity for violence but failed to take sufficient action to restrain Hoyos or warn Lewis.

MPI moves to renew and reargue the prior decisions and orders of this court dated November 15, 2004 and January 31, 2005 to the extent that said decisions denied MPI's motion, pursuant to CPLR § 3211(a)(7), to dismiss the fourth cause action set forth in Lewis's complaint which alleges that MPI was negligent in failing to protect Lewis from Hoyos or to warn Lewis about Hoyos's propensities. MPI contends that it now has new evidence, unavailable to it at the time it made its prior motions, which is sufficient to alter the outcome of the court's decision on MPI's original motion and its motion to renew and reargue the court's original decision. The "new evidence" MPI offers consists of an affidavit executed by Lewis on or about June 28, 2004 (purportedly in connection with a criminal investigation of Hoyos's conduct in Canada) and other information developed in the course of discovery proceedings including the deposition of Hoyos.

The court has twice previously considered MPI's motion. MPI has offered no basis for the court to reconsider it yet again. The fact remains that a CPLR §3211(a) (7) motion is directed to the face of the pleadings involved. In its prior decision, this court determined that, if the facts alleged in Lewis's complaint are accepted as true and granted every favorable inference, the fourth cause of action sets forth a legally cognizable claim against MPI. None of the new information offered by MPI alters this conclusion in any way. Accordingly, MPI's motion for leave to renew its prior motions to dismiss the fourth cause of action contained in the complaint herein; is denied.

The branch of Lewis's cross-motion to reargue/renew is also denied. The time within which to move to reargue the prior determination or this court has long since expired (see CPLR Practice Commentary C2221:8). The assertions of plaintiff's counsel in his affirmation in support of the motion do not constitute new facts which were unavailable to plaintiff at the time of the original motion. Therefore, they do not support renewal of the prior decision.

The branch of Lewis's motion for permission to amend the complaint herein to assert a new cause of action against MPI for deceptive business practices is denied. At this late date, substantial discovery has already been completed. Adding a new cause of action at this stage of the litigation will necessitate new and additional discovery and further delay of the process of proceeding to trial in this matter. Moreover; "... leave to amend a complaint is not granted upon mere request without a proper showing. Rather, in determining whether to grant leave to amend, a court must examine the underlying merit of the causes of action asserted therein ..." (*NAB Construction Corp. V Metropolitan Transportation Authority*, 167 AD 2d 301 [1st Dept, 1990]). In the matter presently before this court, Lewis seeks to amend her complaint to assert a claim against MPI for deceptive business practices in violation of General Business Law §349. However, the claim is without merit. General Business Law §349 is a consumer protection statute. In order for Lewis to make a *prima facie* showing that her claim has merit she would need to demonstrate that she was a "consumer" and that MPI's activities were "consumer oriented". "'Consumers' are 'those who purchase goods and services for personal, family or household use'" (internal citations omitted) (*Medical Society of the State of New York v Oxford Health Plans, Inc.*, 15 AD 3d 206, 207 [1st Dept, 2005]). None of the facts which have been presented offer any indication that Lewis ever interacted with MPI as a consumer. Nor can

Lewis show that MPI undertook any actions directed at consumers generally. Therefore, Lewis has failed to offer a showing of the merit of her proposed new cause of action. Accordingly, the branch of her motion for leave to amend her complaint is denied.

The branch of Lewis's cross-motion to direct MPI to produce Joel Seiden and Paul Manafort for depositions is denied without prejudice to the re-submission of the motion upon compliance with this court's part rules. All counsel herein have been repeatedly advised that the Part Rules require attorneys to contact the court and, with the court's assistance, attempt to resolve discovery matters by conference prior to making discovery motions. Plaintiff's counsel failed to comply with this requirement. As this case is already scheduled for a conference on September 23, 2005 concerning discovery issues, the issue raised in this branch of Lewis's motion will be considered at that time.

Based upon all of the foregoing it is;

ORDERED: that both MPI's motion and Lewis's cross-motion are denied.

The foregoing constitutes the decision and order of this court.

Dated: September 8, 2005

ENTER:

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Hon. Karen S. Smith, J.S.C.