

**Wisehart v Wien & Malkin LLP**

2006 NY Slip Op 30288(U)

December 18, 2006

Supreme Court, New York County

Docket Number:

Judge: Walter Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 600428/2005

WISEHART, ARTHUR M.

vs

WIEN & MALKIN LLP

Sequence Number : 003

DISMISS

INDEX NO.	_____
MOTION DATE	_____
MOTION SEQ. NO.	_____
MOTION CAL. NO.	_____

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

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 12/13/06

**FILED**  
 DEC 20 2006  
 NEW YORK  
 COUNTY CLERK'S OFFICE  
 J.S.C.

**WALTER B. TOLUB**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----X  
ARTHUR M. WISEHART

Plaintiff,

Index No. 600428/05

Mtn Seq.003

-against-

WIEN & MALKIN LLP, PETER L. MALKIN, ESQ.,  
W&H PROPERTIES, LINCOLN BUILDING  
ASSOCIATES LLC, 60 EAST 42<sup>nd</sup> STREET  
ASSOCIATES, and NEWMARK & COMPANY  
REAL ESTATE, INC.

Defendants.

-----X

WALTER B. TOLUB, J.:

By this motion Defendants Wien & Malkin LLP ("Wien & Malkin"), Peter L. Malkin, Esq., ("Mr. Malkin"), W&H Properties ("W&H"), Lincoln Building Associates, LLC, ("LBA"), 60 East Street Associates ("60 Associates") and Newmark & Company Real Estate, Inc. ("Newmark"), seek to renew and reargue their prior motion to dismiss and this court's order dated June 8, 2006 ("Order"), insofar as it failed to dismiss Plaintiff's fraudulent inducement claim. Defendants also move to dismiss Plaintiff's Amended Complaint because it fails to comply with the Order or state a cause of action. Plaintiff cross-moves for sanctions, including the denial of Defendants' motion to renew and reargue, the imposition of punitive damages and an order requiring the Defendants to serve Verified Answers to Plaintiff's Amended

**FILED**  
DEC 20 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Complaint.

Facts

This action was commenced in January 2005 by the Plaintiff appearing pro se. Plaintiff's claims arise from a landlord-tenant dispute over a commercial premises at the Lincoln Building (Premises). The Premises was occupied by Plaintiff's former law firm, Wisehart & Koch. There was a non-payment proceeding in the Housing Part of the Civil Court, brought by Lincoln Building Associates (LBA) against Wisehart & Koch.

Plaintiff then brought this action alleging that LBA commenced a frivolous nonpayment proceeding in the Civil Court to collect excessive charges that were unilaterally imposed on him by the management of the Lincoln Building. Plaintiff also alleged that the lease for the Premises was a nullity because it was not signed by LBA, but by Helmsley-Spear, Inc., and that Helmsley-Spear mismanaged the building, was incompetent, was corrupt, made fraudulent misrepresentations and breached its fiduciary duty by misusing tenant funds. Plaintiff additionally asserted that his firm was fraudulently induced to become a tenant in the building because Defendants falsely represented that it was a Class A space which was well managed by Helmsley-Spear and owned by LBA, that Defendants failed to disclose that extensive renovations were required and that millions of dollars that tenants paid for the maintenance of the building were

wrongfully diverted by Leona Helmsley. Defendants moved to dismiss.

By order dated June 6, 2006, this court dismissed the branches of Plaintiff's complaint based on violations on §§340 and 349 of the General Business Law and §487 of the Judiciary Law. This court also imposed sanctions on the Plaintiff pursuant to 22 NYCRR Part 130 and CPLR §8303-a. This court denied Plaintiff's cross motion in its entirety and ordered that Plaintiff serve an amended complaint in accordance with the decision.

Defendants now seek to renew and reargue the prior motion to dismiss insofar as the court should have dismissed Plaintiff's claims for fraudulent inducement as it was not plead with sufficient specificity and that this court should dismiss the Verified Amended Complaint on the grounds that it fails to comply with the order and fails to state any cause of action.

#### Discussion

The only question on a motion to reargue is whether the court overlooked or misapprehended fact or law in determining a prior motion. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very same questions previously decided. (Foley v. Roche, 68 A.D.2d 558 [1<sup>st</sup> Dept. 1979]) citing Fosdick v. Town of Hempstead, 126 NY 651). Moreover, a motion for leave to reargue may not include "any

matters of fact not offered on the prior motion." (CPLR §2221(d)(2)).

Defendants' motion seeks leave to renew and reargue the prior motion and Order to the extent that the court held that the Plaintiff had stated the basis for a claim that he or his law firm were fraudulently induced to enter into a lease for space in the Lincoln Building. The Defendants argue that the court erred in so holding because the Plaintiff did not plead fraud with the requisite specificity by not delineating the specific fraudulent representations of the various Defendants. Defendants further argue that a fraudulent inducement claim would only lie against those entities that leased the premises to Plaintiff and that most of the Defendants had nothing to do with the lease negotiations.

Defendants' motion to reargue is granted and upon reargument this court modifies its June 6, 2006 decision to the extent that the fraudulent inducement cause of action is dismissed. In order to sufficiently plead fraudulent inducement, the Complaint must allege a material representation, known to be false, made with the intention of inducing reliance, upon which Plaintiff actually relied, consequently sustaining detriment. (Wright v. Selle, 27 AD3d 1065 [4<sup>th</sup> Dept 2006]). In addition, CPLR §3016(b) requires that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, wilful default, breach of

trust, or undue influence, the circumstances constituting the wrong shall be stated in detail." (CPLR §3016(b)).

Here, Mr. Wisehart failed to specify when, where, to whom and by whom any claimed misrepresentations were made. Plaintiff did not separately delineate the roles of each of the Defendants, and instead categorized them together as if they were one entity. Specifically, it is unclear how 60 Associates and W&H were connected to any actionable conduct. Even as to the Defendants that are expressly mentioned in the Complaint, their role in the inducement is not sufficiently explained. Therefore, the Complaint did not state a sufficient cause of action for fraudulent inducement and this Court's June 6, 2006 Order is modified to reflect same.

Defendants also move to dismiss Plaintiff's Amended Complaint in its entirety. Plaintiff was ordered by the June 6, 2006 Order to serve an amended complaint in accordance with that decision. Defendants argue that the Amended Complaint exceeds the scope of the prior order granting leave to re-plead. Defendants further argue that Plaintiff's history of willful and contemptuous conduct warrants dismissal of the entire case. Lastly, Defendants argue that to the extent that the court is inclined to examine the causes of action that the Amended Complaint purports to plead, the causes of action are inadequate and should be dismissed.

The Amended Complaint is improper in that it fails to comply with the court's directive. Plaintiff was to serve and Amended Complaint restating only the fraudulent inducement cause of action. What Plaintiff actually served was a pleading that essentially mirrored its predecessor without reference to the Donnelly Act and Judiciary law. In addition, Plaintiff attempts to state a basis for claims other than fraudulent inducement, including tortious interference, wilful fraud, deceit, fraudulent concealment of conflicting interests and collusion with third-parties. Plaintiff did not seek to reargue his prior motion, instead he proceeded as he saw fit to include new legal theories.

Defendants' motion to dismiss Plaintiff's Amended Complaint is granted. Since Plaintiff's Amended Complaint exceeds the scope of this court's prior Order, and since Plaintiff fails to sufficiently plead a cause of action for fraud, Plaintiff's Amended Complaint is dismissed in its entirety. (Miller v. Keeffe, 198 AD2d 335 [2d Dept 1993]). This court, however, declines to impose any further sanctions on Plaintiff.

As to Plaintiff's cross-motion for an order imposing sanctions, punitive damages and compelling each Defendant to serve its answer to Plaintiff's Amended Complaint, the cross-motion is denied in its entirety. Plaintiff's cross-motion is meritless. There is no basis to sanction Defendants since their

