

Oguagha v Ropes & Gray

2006 NY Slip Op 30375(U)

August 2, 2006

Supreme Court, New York County

Docket Number:

Judge: Judith J. Gische

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PRESENT.

Index Number : 114077/2005

OGUAGHA, CHIKA M.D.

vs

ROPES & GRAY

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE

7/27/06

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 _____

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

FILED

AUG 09 2006

NEW YORK
COUNTY CLERK'S OFFICE

Dated: AUG 02 2006

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X

CHIKA OGUAGHA, M.D.,

Plaintiff,

-against-

ROPES & GRAY and JOHN C. KANE, JR.,

Defendants.

-----X

Decision/Order

Index No.: 114077/05

Seq. No. : 002

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Pltf's motion [renew and reargue] w/KCO affirm in support, exhs	1
Defs x-motion	2
Defs affirm in opp and in support (WIS) w/exhs	3
Pltf's affirm in further support and in opp (KCO) w/exh	4
Defs reply memorandum of law in further support (WIS)	5

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 AUG 09 2006
 NEW YORK
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Upon the foregoing papers, the decision and order of the court is as follows:

This is plaintiff's motion to reargue and renew this court's decision/order dated March 29, 2006, granting defendants' motion for dismissal of this action. Defendants have cross moved for the imposition of sanctions on the basis that plaintiff's motion is frivolous, because the court did not, as plaintiff's contends, misapprehend the relevant facts or misapply any principle of law. CPLR § 2221 [d] [2]; Foley v. Roche, 68 AD2d 558, 567 (1st dept. 1979). Defendants argue further that even assuming there is a basis for renewal, plaintiff's motion should not be entertained because the "new" facts he relies upon could easily have been discovered through due diligence. Branca v. Dept. of Education, 25 AD3d 485 (1st dept. 2006).

Whether this motion is to reargue or renew, the discretion to hear such a motion lies with the court. Its purpose is not to enable the unsuccessful party to argue once again the very questions decided against him or her. Foley v. Roche, *supra*.

Plaintiff's own papers show that there is no basis for reargument for the simple reason that the fact he now seeks to bring to the court's attention was admittedly unknown to him at the time of defendants' motion to dismiss. Thus, by definition, this cannot be a motion to reargue. The motion to reargue is, therefore, denied.

"Although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (see CPLR § 2221 [e]), courts have the discretion to relax this requirement and to grant such a motion in the interest of justice." Mejia v. Nanni, 307 AD2d 870, 871 (1st dept. 2003). Therefore, notwithstanding defendants' argument that the motion should be denied without reaching the merits, the court will allow renewal because, for reasons made clearer below, the new fact makes no difference to the decision this court has already rendered. The facts of the underlying action are set forth in detail in the court's order dismissing this action. That decision/order is incorporated herein by reference since the purpose of this motion is for the court to reconsider its prior decision. Therefore, familiarity with that decision is presumed.

The gravamen of plaintiff's renewal is that comments or statements by defendant John C. Kane, Jr., Esq., in letter are libelous per se because they accuse plaintiff of dishonesty. Attorney Kane is affiliated with the other named defendant, the law firm of Ropes & Gray. The newly discovered fact is that Attorney Kane is not an attorney licensed to practice law in this state. Based upon this newly discovered evidence,

plaintiff contends his case should not have been dismissed, and the court should vacate its order.

Any statement, whether written or oral, is absolutely privileged if it may be considered pertinent to anything "possibly or plausibly" relevant, "with the barest rationality" to litigation. Martirano v. Frost, 25 NY2d 505 (1969); Joseph v. Larry Dorman, P.C., 177 AD2d 618, 619 (2nd dept. 1991). Although the privilege will not protect a gratuitous statement that is wholly "outside the cause," there is clear appellate authority that trial courts should broadly construe what constitutes an out-of-court communication relating to pending or contemplated litigation. Caplan v. Winslet, 218 AD2d 148 (1st dept. 1996); Lemberg v. John Blair Communications, Inc., 258 AD2d 291 (1st dept. 1999). The absolute privilege has been applied to statements by non-attorneys, such as accountants and the parties themselves. Joseph v. Larry Dorman, P.C., *supra*. The circumstances control whether the privilege attaches, not whether the person who made the statement is licensed to practice law.

Therefore, whether or not plaintiff knew, or could have learned that Attorney Kane is not admitted to the New York Bar, is wholly irrelevant to the conclusion that plaintiff's case lacks legal viability. It is the context of the statement that determines whether it is privileged, not the utterer. Joseph v. Larry Dorman, P.C., *supra*.

The court, for the reasons set forth above grants renewal and upon same; adheres to its original decision/order. Plaintiff's motion to have the court vacate the dismissal of this action is denied.

The court also denies defendants' cross-motion for sanctions. The court may impose financial sanctions or costs for frivolous conduct in civil litigation. Part 130,


§130-1.1 (a). Conduct is "frivolous" when it completely is without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law or it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another. 22 NYCRR §130-1.1 (c) (1), (2). That standard has not been met by plaintiff bringing his motion to reargue or renew.

Any relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
August 2, 2006

So Ordered:



HON. JUDITH J. GISCHE, J.S.C.

FILED
AUG 09 2006
NEW YORK
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