

Hariri v Amper

2006 NY Slip Op 30379(U)

March 31, 2006

Supreme Court, New York County

Docket Number: 0100096/2005

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 100096/2005

HARIRI, RONALD

INDEX NO. _____

vs

AMPER, RICHARD

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

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 this motion

be denied in accordance with the attached

FILED

JUN 13 2006

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/31/04

[Signature]
EMILY JANE GOODMAN *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: IAS PART 17

-----X

RONALD D. HARIRI,

Plaintiff,

Index No. 100096/05

-against-

RICHARD AMPER AND LONG ISLAND PINE
BARRENS SOCIETY

Defendants.

-----X

EMILY JANE GOODMAN, J.S.C.:

Plaintiff Ronald D. Hariri moves, pursuant to CPLR 3212 (a), for summary judgment dismissing defendants' counterclaim. The counterclaim seeks costs, attorney's fees, and compensatory and punitive damages, pursuant to Civil Rights Law § 70-a.

The complaint alleges that defendants defamed plaintiff in the course of their efforts to prevent plaintiff's use of a portion of the former Grumman airfield, located in Riverhead, Long Island (Town), and renamed Enterprise Park at Calverton (EPCAL), for commercial aviation purposes. Plaintiff entered into negotiations to purchase property within EPCAL, upon which he would be able to store and use one or more private jet planes and operate a time-share business. Plaintiff's project was stymied when, on December 28, 2004, the Town Board adopted zoning codes for EPCAL that barred storage of aircraft as a stand-alone use.

The Citizen Participation Act (CPA), L 1992, c 767, codified as Civil Rights Law (CRL) §§ 70-a and 76-a and CPLR 3211 (g) and

3212 (h), was enacted "to protect citizen activists from lawsuits commenced by well-financed public permit holders in retaliation for their public advocacy." Guerrero v Carva, 10 AD3d 105, 116 (1st Dept 2004). Such lawsuits are known as "SLAPP" suits, that is, strategic lawsuits against public participation. See generally Street Beat Sportswear, Inc. v National Mobilization Against Sweatshops, 182 Misc 2d 447 (Sup Ct, NY County 1999); Adelphi University v Committee To Save Adelphi, NYLJ, Feb. 6, 1997, at 33, cols 2-4, at 4 (Sup Ct, Nassau County 1997). The CPA applies to:

an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

CRL § 76-a (1) (a). A "public applicant or permittee" is defined as:

any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body

CRL § 76-a (1) (b). In order for a defendant to establish a cause of action under the CPA, the defendant must have "directly challenge[d] an application or permission." Guerrero v Carva, 10 AD3d, at 117. Finally, costs and attorney's fees may be obtained under the CPA only if the defendant demonstrates that the action "was commenced or continued without a substantial basis in fact and law ..." (CRL § 70-a [1] [a]). Additional showings are required in order to obtain other compensatory, and punitive damages, but those requirements need not be discussed here, because plaintiff has

moved to dismiss the counterclaim as a whole, without distinguishing among the damages sought therein. Because the CPA is in derogation of the common law, it must be strictly construed. Guerrero v Carva, 10 AD3d 105, supra.

Plaintiff contends that he is not a public applicant or permittee, within the meaning of the CPA; that the statements that he alleges to be defamatory are not materially related to any effort on the part of defendants to comment on or oppose any application or permit; and that the complaint has a good faith basis in fact and law.

As to the first of these contentions, defendants assert that plaintiff "systematic[ally] and formal[ly] petition[ed] for increased aviation use at the EPCAL" (Amper Aff., at 2), and that he "applied to the Town Board of the Town of Riverhead ... for new zoning to permit increased aviation uses." Ver. Answer and Counterclaims, ¶ 49. As evidence of such activity, defendants have submitted a notice of claim (Notice) that plaintiff filed with the Town of Riverhead (Town). The Notice complained that a recently adopted Town resolution constituted an unlawful restraint on trade, inasmuch as it limited eligibility for a runway use agreement to the one company that was already operating as an established business. The Notice sought Five Million Dollars in damages from the Town of Riverhead for restraint of trade, tortious interference, defamation and violations of the Public Officers Law. Far from being evidence that plaintiff was seeking a zoning change, the Notice expressly stated that the restriction barred him from

establishing an aviation business "in conformity with the existing zoning law and the town's own re-use plan." Apmer Aff., Exh. A, at 2. To be sure, the Notice is evidence that, but for the complained of resolution, plaintiff likely would have applied for the governmental permits necessary to operate an aviation business at EPCAL. But the fact is that he never made any such application, and that the additional aviation uses that he sought to have the Town agree to were, at least in his view, in conformance with existing zoning regulations. Nothing in the affirmation of Town Supervisor Philip Cardinale is to the contrary. That affirmation states that Hariri was an "advocate" for increased aviation use and made direct appeals to him and other Town Board members, spoke out at Town Board meetings and work sessions, and actively debated the issue at civic meetings and in the media. The Town Supervisor also stated that Hariri had lunch with him and expressed his desire to have language in the zoning resolution under consideration which would support Hariri's needs. Thus, defendants maintain that Hariri's aggressive advocacy of his commercial agenda directly to Town Board members and at public meetings, and Hariri's steps to commence litigation against the Town, are the equivalent of applying for a zoning change or other entitlement for use or permission from a government body.

The case cited by defendants in support of this position is inapposite. See Street Beat Sportswear Inc. v Natl. Mobilization against Sweatshops, 182 Misc 2d 447 (Sup Ct, NY Co. 1999). In that case the court held that defendants had a claim under the CPA, even

though plaintiff was merely a registrant under the Labor Law, given that the plaintiff could only run its business with the permission of the Commissioner of Labor, who exercised continuous oversight, and who had the right to revoke the registration upon the finding of a violation. Thus, in that case, it was undisputed that a formal registration was filed. Here, however, there is no evidence that Hariri applied for a zoning change pursuant to Chapter 108 of the Riverhead Town Code. See Yeshiva Chofetz Chaim Radin, Inc. v Village of New Hempstead, 98 F Supp2d 347 (SDNY 2000) (plaintiffs could not be deemed applicants for SLAPP purposes because they never made an application for a zoning or building permit, and, because they refrained from engaging in the application process as a result of their belief that no application was required). Moreover, Hariri obtained no entitlement from the Town, which adopted zoning codes for EPCAL barring storage of aircraft as a stand-alone use.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. Plaintiff avers that he never made any application, with regard to EPCAL, for either a permit of any kind, or a zoning change. Defendants maintain that plaintiff did both, as the result of the referenced activities. The Riverhead Town Code contains specific procedures regarding applications for a zoning variance; no evidence has been produced that these procedures were followed. Nor have Defendants cited cases to support an argument that an individual is deemed a public applicant or permittee based on the

mere fact that he aggressively advocated a commercial agenda directly to Town Board members and at public meetings, and took steps to commence litigation against the Town, and, that these acts constitute the equivalent of an application under the Town Code. Further, as previously noted, the CPA must be strictly construed. Additionally, as the purpose of the CPA is to promote free speech, it would be contrary to the statute's expressed purpose to find that merely advocating one's agenda at public meetings, or instituting lawsuits, falls within the CPA's purview. In view of this discussion, the court need not discuss plaintiff's other contentions.

Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is granted, and defendants' counterclaim is dismissed; and it is further

ORDERED that the rest of this action will continue.

Dated: May 31, 2006

ENTER:


J.S.C.
EMILY JANE GOODMAN

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JUN 13 2006
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NEW YORK