

Kowalczyk v McCullough

2006 NY Slip Op 30796(U)

August 10, 2006

Supreme Court, Albany County

Docket Number: 2106-06

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

MARK KOWALCZYK,

Albany County Clerk
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Plaintiff,



-against-

DECISION and ORDER
INDEX No. 2106-06
RJI No. 01-06-085762

BONNIE L. MCCULLOUGH, RANDY MCCULLOUGH, and
THE NEW YORK STATE FUNERAL DIRECTORS ASSOCIATION, INC.,

Defendants.

Supreme Court Albany County, All Purpose Term, July 20, 2006.
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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Bond, Schoeneck & King, PLLC
Attorney for Defendant New York State Funeral Directors Association, Inc.
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Albany, NY 12210



TERESI, J.:

Defendants move pursuant to CPLR §3211(a)(7) to dismiss the plaintiff's complaint for failure to state a cause of action. Plaintiff opposes the motion and submits a cross motion to amend their complaint.

Plaintiff, Mark Kowalczyk, was a member of the defendant organization, New York State Funeral Directors Association, Inc. (hereinafter NYSFDA), former chair of their Government Affairs Committee, member of the Board of Directors, and worked with defendants Bonnie L. McCullough and Randy McCullough, as deputy director. The plaintiff brought this action alleging that defendants Bonnie and Randy McCullough committed acts that were, allegedly, defamatory in nature. The amended complaint alleges three causes of action: defamation per se, defamation, and intentional infliction of emotional distress. This action arises from events that plaintiff alleges took place in April 2005 and eventually resulted in plaintiff's resignation from his positions with the defendant NYSFDA.

The plaintiff contends that during April 2005 defendants Bonnie and Randy McCullough made statements to other members of the defendant NYSFDA alleging that the plaintiff was harassing Bonnie McCullough. Further, the plaintiff alleges that Bonnie and Randy McCullough made statements alleging that plaintiff was a volatile drinker and they feared he would do physical harm to her and her husband. This resulted in the eventual resignation of plaintiff from his positions with the NYSFDA and the association retaining the services of the police to protect Bonnie McCullough from the plaintiff.

The defendants have, individually, submitted a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7). Defendants contend that plaintiff's complaint

fails to specify the proper pleading for the plaintiff's causes of action. The plaintiff has submitted a cross motion to amend the complaint to add expanded pleadings.

The Court, as an exercise of its discretion, will grant the plaintiff's cross motion to amend the complaint and thereby rendering defendants' motions to dismiss moot.

Leave to amend is granted freely and at the court's discretion pursuant to CPLR §3025. Circumstances taken into account by the Court are "the absence of prejudice or surprise resulting from the delay except in situations where the proposed amendment is wholly devoid of merit."Moon v Clear Channel Communications, Inc., 307 A.D.2d 628, 629 (3rd Dept. 2003) (citations omitted).

This Court will grant plaintiff's cross motion to amend the complaint. The plaintiff's original complaint pleads the same causes of action as the amended complaint but adds expanded statements of fact; therefore, the defendants are not caught off guard by any aspect of the amended complaint. By granting the leave to amend surprise or prejudice will not result to the defendants. Additionally, this Court finds that the proposed amendment is on its face not wholly devoid of merit. Although leave to amend is granted, this Court takes note that the plaintiff has now twice amended his original complaint in response to motions to dismiss for alleged defects in the pleadings.

This Court, in its discretion, will grant the plaintiff's cross motion to amend the complaint to expand the pleadings. Plaintiff must serve the second amended complaint within ten days.

All papers, including this Decision and Order are being returned to the attorneys for the Plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR

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2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

So Ordered.

Albany County Clerk
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Dated: August 10, 2006
Albany, New York

Joseph C. Teresi
Joseph C. Teresi, J.S.C.

Thomas J. Ci...
8.11.06

Papers Considered:

1. Notice of Motion to Dismiss Verified Complaint, dated May 19, 2006, with Attached Papers.
2. Notice of Motion, dated June 9, 2006.
3. Notice of Cross Motion to Amend Complaint, dated June 14, 2006.
4. Plaintiff Mark Kowalczyk's Affidavit in Support of Memorandum of Law in Opposition to Defendants Bonnie and Randy McCullough and New York State Funeral Directors Association, Inc.'s Motions to Dismiss the Verified Complaint, dated June 14, 2006.
5. Attorney Kevin A. Luibrand 's Affirmation in Support of Memorandum of Law in Opposition to Defendants Bonnie and Randy McCullough and New York State Funeral Directors Association Inc.'s Motions to Dismiss the Verified Complaint, undated, with Attached Exhibits A - N.
6. Attorney Kevin A. Luibrand 's Affirmation in Support of Reply Memorandum of Law in Opposition to Defendants Bonnie and Randy McCullough and New York State Funeral Directors Association Inc.'s Motions to Dismiss the Verified Complaint, undated, with Attached Exhibits O - U.