

**Leyse v Domino's Pizza LLC**

2007 NY Slip Op 30186(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0100792

Judge: Marylin G. Diamond

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

**PRESENT: HON. MARYLIN G. DIAMOND**

**PART 48**

*Justice*

MARK LEYSE, individually and on behalf of all others  
similarly situated,

Plaintiff,

INDEX NO. 100792/05

-against-

MOTION SEQ. NO. 003

DOMINO'S PIZZA LLC,

Defendant.

**FILED**  
MAR 15 2007  
COUNTY CLERK  
NEW YORK

Cross-Motion:  Yes  No

**Upon the foregoing papers, it is ordered that:** In this action, the plaintiff alleges that the defendant Domino's Pizza LLC trespassed on his property by leaving an advertising flier in front of the door to his apartment. In addition to seeking relief in plaintiff's individual capacity, the complaint also seeks certification of a class consisting of persons similarly situated. Prior to commencing this action, plaintiff brought a similar class action in federal court which was dismissed on the ground that plaintiff did not meet the amount in controversy requirement for federal subject matter jurisdiction. After this state court action was then filed, the federal class action laws were amended as to the amount in controversy requirement and, based on this amendment, plaintiff concluded that he could now bring a class action lawsuit in federal court. Consequently, he moved, pursuant to CPLR 3217(b), for leave to discontinue this action without prejudice. The defendant cross-moved to dismiss the class action portion of the complaint on the ground that plaintiff had not moved for an order of certification within 60 days after the defendant's time to serve a responsive pleading had expired, as required under CPLR 902. The defendant also sought dismissal of that portion of the complaint brought by plaintiff in his individual capacity for failure to state a cause of action and sought sanctions against plaintiff and/or his counsel for having brought a frivolous action.

By decision and order dated October 11, 2005, the court (Rosalyn Richter, J.) granted the plaintiff's motion to dismiss but with prejudice and on condition that he pay the costs and disbursements which the defendant had incurred in this action, as well as the defendant's attorney's fees in responding to the motion and in preparing the cross-motion. The court denied the defendant's cross-motion as moot.

Thereafter, the issue of the reasonable attorney's fees which the defendant had incurred on the motion and cross-motion was referred to a special referee. Following a hearing at which plaintiff participated, the special referee issued a report recommending that the amount due from plaintiff to defendant for costs, disbursements and attorney's fees be fixed at \$2,757.10, plus statutory costs. By decision and order dated November 27, 2006, the court (Rosalyn Richter, J.) confirmed the special referee's recommendation and directed that, within twenty days, plaintiff pay defendant the sum of \$2,757.10, plus statutory costs of \$500, or inform the court that he did not intend to comply with this condition, in which case the action would not be discontinued. Plaintiff subsequently notified the court that he did not intend to pay the fixed amount. By decision and order dated December 5, 2006, the court (Rosalyn Richter, J.) restored this action to the court's active calendar and restored the defendant's cross-motion to dismiss and for sanctions. It is the cross-motion which is the subject of this decision and order.

**Discussion**

The defendant's cross-motion to dismiss the class action allegation of the complaint must be granted. See *Hernandez v. Gateway Demolition Corp.*, 263 AD2d 467 (2<sup>nd</sup> Dept 1999). See also *O'Hara v. Del Bello*, 47 NY2d 363 (1979); *Shah v. Wilco Systems, Inc.*, 27 AD3d 169, 173 (1<sup>st</sup> Dept 2005). Although the mandatory sixty-day period under CPLR 902 for moving to certify the action as a class action expired approximately two years ago, the plaintiff has still never brought such a motion and, indeed, has failed to provide the court with any explanation for not having complied with this requirement.

As to the merits of the plaintiff's claim in his individual capacity, the courts have held commercial advertisers liable for trespass by placing advertisements and fliers on private property only where there is a law or order barring it from doing so or where it has received prior notice that the homeowner does not wish to receive such materials. See, e.g., *Tillman v. Distribution Systems of Amer., Inc.*, 224 AD2d 79, 83 (2<sup>nd</sup> Dept 1996); *Miller v. Distribution Systems of Amer., Inc.*, 175 Misc2d 513 (App T 2<sup>nd</sup> Dept 1997). See also *Rowan v. Post Office Dept.*, 397 US 728, 737 (1970). The plaintiff has not cited any cases to the contrary and has not suggested that he ever previously notified Domino Pizza that he did not wish to have any fliers left in front of his apartment. The court therefore agrees with the defendant that the complaint fails to state a cause of action for trespass to real property and must be dismissed.

Accordingly, the complaint is hereby dismissed in its entirety with prejudice.

Finally, as to the imposition of sanctions, Part 130 of the Rules of the Chief Administrator provides, *inter alia*, that financial sanctions may be imposed upon any party or attorney who engages in frivolous conduct, which is defined as conduct that is "completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law." 20 NYCRR §130-1.1(c)(1). Here, plaintiff's counsel, Todd C. Bank, has failed to provide any reasonable legal argument under which this court could conclude that the complaint states a valid cause of action in trespass. By bringing this action, Mr. Bank has wasted the court's time and has required the defendant to expend time and money in opposition. A \$500 sanction against counsel is therefore warranted. See *Sanchez v. Javind Apt. Corp.*, 246 AD2d 353 (1<sup>st</sup> Dept. 1998). Mr. Bank shall pay this amount to the Lawyers' Fund for Client Protection by depositing \$500 in the form of cash or certified check payable to the New York County Clerk, together with a copy of this order, for transmittal to the New York State Commissioner of Taxation and Finance. In addition, counsel and plaintiff shall be jointly and severally liable for paying defendant the costs, including reasonable attorney's fees, which the defendant incurred in opposing the plaintiff's CPLR 3217(b) motion and in bringing its own cross-motion. See *Preferred Equities Corporation v. Ziegelman*, 190 AD2d 659, 660 (2<sup>nd</sup> Dept. 1993). Since the court has previously determined that these costs total \$3,257.10, including statutory costs, Mr. Bank and plaintiff are directed to pay this amount to the defendant within 20 days of service upon them of a copy of this order.

The Clerk Shall Enter Judgment Herein

Dated: 3-6-07

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
MAR 15 2007  
COUNTY CLERK'S OFFICE  
NEW YORK