

Kaplan v Spectron Energy Inc.

2007 NY Slip Op 30916(U)

April 17, 2007

Supreme Court, New York County

Docket Number: 0108915/2006

Judge: Debra A. James

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

PETER KAPLAN,

Plaintiff,

Index No.: 108915/06

- v -

Motion Date: 12/19/2005

SPECTRON ENERGY INC.

Defendant.

Motion Seq. No.: 04

Motion Cal. No.: 57

The following papers, numbered 1 to 5 were read on this motion to replead.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

PAPERS NUMBERED

1, 2

3, 4

5

FILED

APR 25 2007

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

By Order dated September 12, 2006, this court granted plaintiff's motion for reargument of the court's August 22, 2006, Order dismissing plaintiff's complaint and modified its prior Order only to the extent of stating that dismissal was without prejudice to plaintiff's ability to seek leave to amend the complaint. Plaintiff now seeks such relief.

Defendant argues that the court should reject plaintiff's motion because the amendment is not meritorious. However, the cases cited by the defendant merely stand for the proposition that where leave to amend is sought in response or opposition to a motion for summary judgment, the movant is required to provide

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

an affidavit of merit. Defendant has failed to cite any authority that requires an affidavit of merit to be proffered as part of a motion to amend a complaint absent prejudice or a motion for post-joinder of issue summary dismissal of the existing complaint. Further, defendant's argument that plaintiff's motion to amend is untimely is also incorrect on the record in front of the court as the court only granted leave to the plaintiff to amend the complaint by Order dated September 12, 2006 and entered September 26, 2006. Plaintiff filed this motion on October 12, 2006, within three weeks of the entry of the court's Order and therefore the timeliness of the application is not in issue.

Finally, the court agrees with plaintiff that the amendment is proper. In dismissing the original complaint, the court on the record held that plaintiff's claims, based upon plaintiff's alleged termination, could not be maintained under the First Department decision in Jaffe v. Paramount Communications, Inc. (222 AD2d 17 [1st Dept 1996]) because the contract set forth that any termination had to be in writing and there was no allegation of such a writing. At oral argument on the prior motion to reargue, plaintiff raised the issue that the contract does not necessarily require written notice by the plaintiff to resign from his employment. The defendant disagreed and argued that three month's written notice was required. Partly, the issue

turned on the difference between the contract's use of the term "termination" used in Paragraph 3 versus the term "resigned" in Paragraph 4 of the contract concerning the payment of bonuses. There is a colorable argument for plaintiff's interpretation of the contract and thus the facts alleged in the proposed amended complaint have sufficient merit to justify this court's exercise of discretion in allowing the amendment. Of course, defendant shall have the opportunity under CPLR 3211 and 3212 to challenge the amended pleading if and when it so chooses.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the complaint is GRANTED and the amended complaint in the proposed form annexed to the moving papers shall be served, with a copy of this Order with notice of entry thereof, within 30 days of the entry of this Order; and it is further

ORDERED that defendant shall serve an answer to the amended complaint within such time delineated in the CPLR; and it is further

ORDERED that this action is RESTORED to the court's pre-note of issue calendar; and it is further

ORDERED that the parties are directed to attend a preliminary conference on May 15, 2007, in IAS Part 59, Room 1254, 111 Centre Street, at 9:30 A.M.

This is the decision and order of the court.

Dated: April 17, 2007

ENTER:

Debra A. James J.S.C.
DEBRA A. JAMES
J.S.C.

FILED
APR 25 2007
NEW YORK
COUNTY CLERK'S OFFICE