

iVillage, Inc. v Fox

2007 NY Slip Op 31192(U)

January 8, 2007

Supreme Court, New York County

Docket Number: 0600185/0185

Judge: Charles E. Ramos

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

PRESENT-

PART _____

Index Number : 600185/2006

VILLAGE

vs

FOX, KELLI

Sequence Number : 002

REARGUMENT/RECONSIDERATION

C

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this 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

is decided in accordance with
accompanying memorandum decision and order.

FILED
JAN 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/18/07

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Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
HON. CHARLES E. RAMOS

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X
 iVILLAGE, INC, and KNOWLEDGEWEB,
 inc. D/B/A Astrology.com

Index No. 600185/06

Plaintiffs,

-against-

KELLI FOX and DAVID FOX,

Defendants.

-----X

Charles Edward Ramos, J.S.C.:

Defendants, Kelli Fox and David Fox (collectively "the Foxes") move pursuant to CPLR 2221(d) for leave to reargue this Court's June 30, 2006 decision denying their motion to dismiss. The motion is granted and this decision is substituted in the place and stead of our prior determination.

Background

In August 2005, the Foxes filed a complaint against plaintiffs, iVillage, Inc and KnowledgeWeb, Inc, (collectively "the Companies") in the Northern District of California (the "Federal Action"). In the Federal Action, in addition to claims under the Federal Lehman Act, the Foxes also alleged various state law claims, including a breach of contract claim involving the Marketing Agreement and Service Mark Agreement. These agreements were executed between the parties in connection with the Companies' acquisition of KnowledgeWeb from the Foxes in 1999 and the Foxes' subsequent termination of employment with the

Companies.¹

In December 2005, the Foxes filed an action against the Companies in the Superior Court of California ("the California Action"). In the California Action, the Foxes alleged a breach of the Marketing Agreement and Service Mark Assignment Agreement.

The Companies filed this action for breach of contract against the Foxes in the Supreme Court of New York (the "New York Action") on January 19, 2006. In the New York Action, the Companies allege breaches of the Separation Agreements.

The Foxes filed a motion to dismiss the New York Action on February 17, 2006. An argument was held on this motion April 18, 2006. The Foxes argue that they moved pursuant to CPLR 3211(a)(4) and 3211(a)(8) to dismiss the complaint because the California Action involved the same parties and causes of action. The Companies opposed the motion on the grounds that (1) the parties' forum selection clause required the parties to litigate the Separation Agreement in New York and (2) that the California Action did not qualify under CPLR 3211(a)(4) as a prior pending action permitting dismissal.

Subsequently, and pursuant to this Court's April 18, 2006 statement that it intended to grant the Foxes' motion, the Companies filed a Cross-Complaint² to the Foxes' first amended

¹This Court's June 30, 2006 decision details additional background facts as well as substantive issues regarding the underlying action.

² A cross complaint is the equivalent of a counterclaim in California.

complaint in the California Action. The Foxes filed their answer to the cross-complaint on June 16, 2006.

On June 30, 2006, in a written memorandum decision and order, this Court ultimately denied the Foxes' motion to dismiss and upheld the validity of the New York forum selection clause contained in the Separation Agreements. However, this Court incorrectly stated in its decision that the action pending in California between the parties had been dismissed. In fact the Federal Action, not the California Action, had been dismissed.

The Foxes argue that they should be granted leave to reargue because the Court's denial of the motion was based on a misapprehension of fact regarding the status of a separate action between the parties in California.

The Companies assert that the Court's mistake of fact was irrelevant and incidental to the Court's determination and that the forum selection clause is valid and enforceable against the Foxes.

Discussion

A motion for leave to reargue affords the moving party an opportunity to show that the court overlooked or misapprehended the facts or the law, thus mistakenly arriving at its earlier decision. See CPLR 2221 d (2); *William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 (1st Dep't, 1992). It is not to be used, however, as the means by which an unsuccessful party is permitted to argue again the same issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]), or to provide an

unsuccessful party with a second opportunity to present new or different arguments from those originally asserted. *Gellert & Rodner v Gem Community Mgt.*, 20 AD3d 388 (2nd Dep't, 2005).

In the June 30, 2006 decision this Court's prior ruling held that:

Defendants do not dispute that they agreed to the forum selection clause voluntarily. Further, defendants do not argue that this contractual forum selection clause is unjust or unreasonable. [...]the Foxes are required to accept jurisdiction of the New York courts if an action is brought here. The forum selection clause is valid. The forum clause does not preclude iVillage from proceeding in California on a claim originating from the Separation Agreement, but that action was dismissed.

A motion to reargue should only be granted where the court misapprehended a "material fact" which was "relevant" to the court's determination. *T Juniors, Inc., v Utica Mutual Ins. Co.*, 814 NYS2d 565, 2005 WL 3487854, *2 (Sup Ct NY Co., Sept. 22, 2005).

The Companies do not in fact have a prior action on the same causes of action pending in California courts. On April 18, 2006, the Foxes argued before this Court that the complaint should be brought as compulsory counterclaims in the California Action rather than a new action in New York because parties claimed breaches of the Marketing Agreement in both actions. This Court erroneously granted the Foxes' motion to dismiss and specifically ordered that "[the Foxes in New York] must consent or not contest jurisdiction in California." On May 12, 2006, upon this Court's erroneous instructions, the Companies filed a Cross-Complaint to the Foxes' first amended complaint in the


California Action.

As this Court explicitly stated during the April 18, 2006 argument as well as in its June 30, 2006 decision, the forum selection clause is valid. Additionally, this Court has already differentiated the Companies' New York complaint, in which plaintiffs allege breaches of the Separation Agreement, from their California complaint in which the Companies claim breaches of the Marketing and Service Mark Agreements.

Accordingly, after considering the Foxes' motion to reargue as well as their arguments, the Foxes' underlying motion to dismiss is denied. A valid enforceable forum selection clause prevents dismissal of the complaint.

It is ORDERED that this motion to dismiss the complaint pursuant to CPLR 3211 (a)(4) is denied.

Dated: January 8, 2007


HON. CHARLES E. RAMOS
U.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.