Dominguez v Friedman
2007 NY Slip Op 32804(U)
September 4, 2007
Supreme Court, Nassau County
Docket Number: 2984-04/
Judge: William R. Lamarca
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Scan

Present: HON. WILLIAM R. LaMARCA
Justice

DANNY DOMINGUEZ and NANCY VASQUEZ,

Plaintiffs,

-against-

RONALD FRIEDMAN, individually and as a member of the Board of Directors of East Rock Tenants Corp., EAST ROCK TENANTS CORP. and ALEXANDER WOLFE and COMPANY, INC.,

Defendants.

Motion Sequence # 009
Submitted June 15, 2007

INDEX NO: 12984/04

The following papers were read on these motions:

Notice of Motion..1
Affirmation in Opposition..2
Reply Affirmation...3

Requested Relief

Plaintiffs, DANNY DOMINGUEZ and NANCY VASQUEZ, move for an order, pursuant to CPLR 2221(d), granting leave to reargue this Court's prior order, dated March 28, 2007, that granted defendants' motion for summary judgment dismissing, *inter alia*, the first, third and fourth causes of action sounding in Slander *Per Se,*

Discriminatory Discharge and Retaliatory Termination, and upon reargument, reinstating said causes of action. Counsel for plaintiffs' claims that there has been an intervening change in decisional law that would affect said causes of action. Defendants, RONALD FRIEDMAN, individually and as a member of the Board of Directors of East Rock Tenants Corp., EAST ROCK TENANTS CORP. (hereinafter referred to as "EAST ROCK") and ALEXANDER WOLFE & COMPANY, INC., (hereinafter referred to as "WOLFE") oppose the motion, which is determined as follows:

Background

This action arises out of plaintiff DOMINGUEZ's employment as superintendent of a 75 unit, five building residential cooperative complex known as East Rock Gardens. DOMINGUEZ was employed, pursuant to an employment contract, by the defendant, EAST ROCK, from August 30, 2002 to January 4, 2005, at which time he was terminated. DOMINGUEZ was the sole employee at East Rock Gardens during this time (*Motion*, Ex. D, ¶1).

Pursuant to his employment contract, DOMINGUEZ was permitted to reside in an apartment at the co-op as the resident superintendent and tenant (*Contract*, ¶13). For a short period of time, from September 2002 through November 2002, plaintiff, NANCY VASQUEZ, was also employed by East Rock to assist DOMINGUEZ in clearing out basement storage areas, etc. She resided with DOMINGUEZ in his apartment at the co-op allegedly as "a member of his family". At his deposition, plaintiff, DOMINGUEZ identified VASQUEZ as his fiancé (*Dominguez EBT*, p. 7).

DOMINGUEZ brings this action and claims that he was subjected to a hostile work environment based on his race and nationality which affected the conditions of his employment. Plaintiff also alleges that the defendants retaliated against the plaintiff by terminating his employment after he reported to the co-op's attorneys and to the Department of Labor about the hostile work environment to which he had been subjected (*Complaint*, ¶96).

Specifically, DOMINGUEZ alleges that, in May 2004, defendant, RONALD FRIEDMAN, a resident at East Rock Gardens, accused him of stealing a package addressed to his wife. Plaintiff states that, despite recovery of the package in the bulk mail area of another building of the East Rock co-op complex, FRIEDMAN continued to tell other residents that DOMINGUEZ "was stealing packages from the tenants" (*Complaint* at ¶26), that he was "dishonest and could not be trusted alone in their apartments" (*Complaint* at ¶28) and that he was "untrustworthy" and should not be given keys to their apartments (*Complaint* at ¶29). DOMINGUEZ submits that, during the summer of 2004, while campaigning for election to the Board of Directors of the co-op, FRIEDMAN published and circulated a written memorandum to the other residents of the co-op, entitled "Safety, Security and Stability". In essence, he stated that the reason he was running for the Board of Directors was because parcels sent to co-op tenants over the preceding year were missing, that none of the superintendents employed by the various management companies were satisfactory, and that a better vetting system was needed to insure that future superintendents of the complex could

be trusted to perform their duties and to respect the tenants. The written flyer did not mention DOMINGUEZ by name.

DOMINGUEZ further alleges that when RONALD FRIEDMAN was elected to the Board of Directors of East Rock on July 22, 2004, as Secretary of the Corporation, he, along with the other residents, began a campaign to "get rid" of DOMINGUEZ by continuing to accuse him of stealing packages delivered to the complex while knowing such statements were false, by harassing both plaintiffs with ethnically offensive epithets and profanity, and by attempting to provoke him into a physical confrontation with the defendants in a manner intended to result in the termination of his job. He alleges that defendants disparaged him, discriminated against him, violated his civil and contractual rights, damaged his reputation and his ability to earn a living, and that on January 4, 2005 he was terminated as the superintendent of the complex. He contends that defendant, WOLFE, which replaced Herbert Slepoy, Inc. as the managing agent for the co-op in June 2004, failed to support DOMINGUEZ in dealing with the tenants, unlike the prior managing agent, and attempted to impose an "English Only" rule at the complex.

In support of the motion to reargue, plaintiffs claim that the Court, in dismissing their first, third and fourth causes of action, "misunderstood [and] misapprehended certain very important evidence and as a result has mis-stated certain of the facts". Counsel argues that, in the third and fourth causes of action, there has been an intervening change in the decisional law affecting "retaliation", citing the United States Supreme Court case of *Burlington National &. Santa Fe RR v White*, 548 US1, 126 S.

Ct 2406 (2006, which he claims "has resulted in an expanded definition of retaliation, and decisional law applicable to the Mc Donnell Douglas Test has reinterpreted the burden of proof requirement of the final prong". Counsel argues that because the Court permitted the second cause of action for defamation to go forward and found questions of fact as to whether defendants' words were spoken with malice sufficient to overcome the Court's finding of qualified privilege between the tenants of the co-op, the first action for slander *per se* should be permitted as well. Counsel claims that he discussed various portions of the three (3) causes of action in issue throughout the affirmation in opposition to the motion to dismiss, although perhaps not in the categories designated for each cause of action, and urges that the actions should be reinstated.

In opposition to the motion, counsel for defendants' points out that the *Burlington* case, relied upon by plaintiffs, is not new decisional law and was handed down on June 22, 2006, almost six (6) months before plaintiffs' submission of opposition and a cross-motion, on January 2, 2007. Indeed, plaintiffs' reply papers refer to and cite the *Burlington* decision. Moreover, counsel for defendants contend that, while plaintiffs argue that *Burlington* allows them to maintain an action under Title VII and various "analytically identical" causes of action under the Human Rights Law, Title VII only applies to employers with fifteen (15) or more employees, and does not apply herein as DOMINGUEZ was the sole employee of EAST ROCK. It is defendants' position that plaintiffs simply rehash previously cited cases and arguments and that there is nothing new, nothing overlooked and nothing misunderstood, and that reargument should be denied.

The Law

A motion to reargue is addressed to the sound discretion of the Court and may be granted upon a showing that the court overlooked or misapprehended relevant law in arriving at its previous decision (*Hoey-Kennedy v Kennedy*, 294 AD2d 573, 742 NYS2d 573 [2nd Dept. 2002]; *Long v Long*, 251 AD2d 631, 676 NYS2d 208 [2nd Dept. 1998]). A motion to reargue is not a means for an unsuccessful party to obtain a second opportunity to relitigate issues that have been previously decided (*McGill v Goldman*, 261 AD2d 593, 691 NYS2d 75 [2nd Dept. 1999]; *Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 588 NYS2d 8 [1st Dept. 1992]).

Plaintiffs' first cause of action is for slander *per se.* Words constitute "slander *per se*" if they impute the commission of a serious crime, a loathsome disease, unchaste behavior in a woman, or if they affect the plaintiff in his trade, occupation or profession (*Liberman v Gelstein*, 80 NY2d 429, 590 NYS2d 857, 605 NE2d 344 [C.A. 1992]; *Warlock Enterprises v City Center Associates*, 204 AD2d 438, 611 NYS2d 651 [2nd Dept. 1994]). Unlike a cause of action for slander, when statements fall within one or more of the slander *per se* categories, the law presumes that damages will result and they need not be alleged or proven (*Liberman v Gelstein*, *supra*). As the *Liberman* Court noted, however, "[w]hen compelling public policy requires that the speaker be immune from suit, the law affords an absolute privilege, while statements fostering a lesser public interest are only conditionally privileged" (*Liberman v Gelstein*, *supra*). One such conditional or qualified privilege is the "common interest privilege," which extends to a "communication made by one person to another upon a subject in which

both have an interest". (*Liberman v Gelstein*, *supra*). The common interest privilege protects a tenant's defamatory statements to other tenants in a co-op regarding the co-op's business, operation and management (*Tanner & Gilbert v Verno*, 92 AD2d 802, 460 NYS2d 48 [1st Dept.1983]; *Pusch v Pullman, et al.*, 11 Misc.3d 1074(A), 460 NYS2d 48 [Sup. Ct., New York 2003]; *see also, Liberman v Gelstein*, *supra*).

Nonetheless, the shield provided by a qualified privilege can be pierced by a showing that defendant acted with actual malice (*Liberman v Gelstein*, *supra*). Malice can be shown either at common law, by showing that ill will was the sole cause for the publication, or by establishing constitutional malice, which is defined as publishing a statement knowing of its falsity or acting with reckless disregard for the truth or falsity of the statement. Under this standard, "the plaintiff must demonstrate that the 'statements [were] made with [a] high degree of awareness of their probable falsity' * * *In other words, there 'must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of [the] publication' "(*Liberman,* supra at 438; *see also, Loughry v Lincoln First Bank*, 67 NY2d 369, 502 NYS2d 965, 494 NE2d 70 [C.A.1986]).

This Court held in its original determination that defendant had a qualified privilege in making his statements because they were made to other tenants who shared a common interest in the co-op and in the governing of the Board (*see, Chernick v Rothstein*, *supra; Tanner & Gilbert v Verno*, supra; *Pusch v Pullman, et. al.*, *supra*), and that plaintiff had failed to oppose defendants' motion for dismissal of the slander *per se* action. However, upon reargument, and upon reading the affirmation in opposition in

its totality wherein the discussion of malice was raised with respect to plaintiffs' second cause of action for defamation, the Court finds that modification of its prior determination is appropriate.

Defendants' statements -- that plaintiff DOMINGUEZ is a thief, that he is stealing packages, that he cannot be trusted in the tenants' apartments -- not only affect the plaintiff in his profession as the Superintendent of East Rock Gardens, but they also allege the serious crime of larceny. Defendants' statements, therefore, are actionable without the need to establish special harm, and, absent any privilege are sufficient to go to the jury (*Liberman v Gelstein*, *supra*). The Court finds that since the allegedly stolen packages were ultimately recovered, a question of fact was raised as to whether defendant was motivated by malice in continuing to make such charges which precludes dismissal (*Liberman v Gelstein*, *supra*). Upon reargument, it is the judgment of the Court that plaintiffs' first cause of action for slander *per se* should be permitted to proceed as the plaintiffs have identified a question of fact regarding malice under the second cause of action for defamation. Accordingly, plaintiffs' first cause of action for slander *per se* is herewith reinstated.

Plaintiffs' also seek to reinstate their third and fourth causes of action for discriminatory discharge/hostile work environment and retaliatory termination, respectively. Said causes of action were brought pursuant to Executive Law §296. Under the Executive Law the term "employer" excludes "any employer with fewer than four persons in his employ" (Executive Law §292 [5]; *see Kern v City of Rochester*, 254 AD2d 757, 678 NYS2d 206 [4th Dept. 1998]; *Germakian v Kenny Intl. Corp.*, 151 AD2d

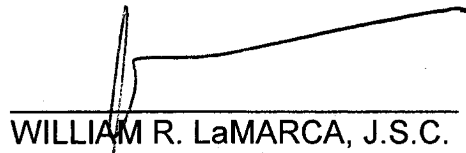
342, 543 NYS2d 66 [1st Dept. 1989]); *DiStefano v Kopelman*, 265 AD2d 446, 697 NYS2d 111 [2nd Dept. 1999]). At no time during the period in which the alleged harassing behavior occurred did the defendant employ four or more persons. Accordingly, the Court adheres to its prior determination with respect to plaintiffs' third and fourth causes of action. Based on the foregoing, it is hereby

ORDERED, that plaintiffs' motion for reargument is granted and, upon reargument, the Court reinstates the first cause of action for slander *per se*, only.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: September 4, 2007



WILLIAM R. LaMARCA, J.S.C.

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TO: Mark S. Moroknek, Esq.
Attorney for Plaintiffs
1565 Franklin Avenue
Mineola, NY 11501

O'Connor Redd, LLP
Attorneys for Defendants
200 Mamaroneck Avenue
White Plains, NY 10601

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