

BCRE 230 Riverside LLC v Fuchs

2008 NY Slip Op 30114(U)

January 16, 2008

Supreme Court, New York County

Docket Number: 0109809/2006

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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BCRE 230 RIVERSIDE LLC

Index No. 109809/06
Mtn. Seq. 007

Plaintiff

-against-

ERICH FUCHS

Defendant
-----x

WALTER TOLUB, J.:

By this motion Defendant seeks to renew and vacate that part of this court's order dated November 5, 2007, which denied Defendant's motion to amend the counterclaim for defamation and which dismissed the defamation counterclaim.

Facts

As stated in this court's prior decision, on July 14, 2006 Plaintiff commenced this action against the Defendant seeking injunctive and declaratory relief. Plaintiff sought a declaration that Defendant was in violation of his lease agreement for throwing urine and other matter from the balcony of his apartment. On August 10, 2006, Defendant answered the complaint denying the allegations and asserted three counterclaims; (1) tortious conduct consisting of retaliation and harassment and resulting damages in the sum of \$500,000; (2) defamation arising from the publication of an New York Post article and damages in the sum of \$2.5 million; and (3) attorneys' fees.

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

On December 20, 2006, this court issued its Findings of Fact and Conclusions of Law dismissing the complaint and awarding judgment to the Defendant. The Order indicated that it constituted the final disposition of the case even though the issues raised in the counterclaims were not addressed. So, on February 8, 2007, this court issued a superceding order placing the case back on the court's calendar. On May 4, 2007, at a conference, Defendant stated that it wanted to amend its counterclaims and this court directed that Defendant move for leave to amend the counterclaims.

Defendant's original motion seeking to amend its counterclaims was made returnable on June 18, 2007. Defendant's motion sought to amend its counterclaims to consist of: (1) malicious prosecution; (2) defamation arising from the publication of an New York Post article and damages in the sum of \$2.5 million; (3) tortious conduct consisting injurious falsehood; and (4) attorneys' fees. By order dated November 5, 2007 this court denied Defendant's motion to amend the counterclaims and dismissed them.

Defendant now specifically seeks to renew and vacate that part of the November 5, 2007 order which denied Defendant's motion to amend the counterclaim for defamation and dismissed the counterclaim.

Discussion

Since Defendant's counterclaim for defamation did not contain the essential elements to support an independent cause of action against the Plaintiff, the motion to amend was denied.

Defamation is a false statement resulting in injury to reputation. (Rinaldi v. Holt, Rinehart & Winston, Inc., 42 NY2d 369 [1977]). Defamation occurs in the form of libel or slander. Libel involves publication, something in writing or pictures, and slander involves statements, something spoken. The elements of a defamation claim are: (1) a false and injurious statement of fact concerning the plaintiff that exposes a person to hatred, contempt or aversion or causes an unsavory opinion of him or her in the minds of a substantial number in the community; (2) publication to a third-party; and (3) special damages. (Golub v. Enquirer/Star Group, 89 NY2d 1074 [1997]).

Plaintiff argued that Defendant's counterclaim for defamation must be dismissed because there is no recitation if (1) the actual words of the defamation; (2) the identity of the alleged defamers; (3) the identity of the person(s) to whom the alleged defamatory remarks were published; (4) there is no specification of damages. Instead, Plaintiff argues that Defendant's claim is based on a New York Post article that contains no more information than could be found as a matter of public record within the court's file.

Defendant argued that although CPLR 3016(a) requires a party to set forth the particular words constituting defamation, the Defendant was not present at the time Plaintiff uttered the defamatory statements to the reporters who wrote the Post article and therefore the Defendant should have an opportunity to conduct depositions.

This court disagreed and stated that although the Defendant claims to have sought out depositions of the Post reporters, they have not sought to do so with the instruments provided by the CPLR. No one from the Post was served with a subpoena, or with a Notice of Deposition. Since subpoenas were not served, reporters from the Post have refused to appear for depositions since they are non-parties. Accordingly, Defendant's counterclaim for defamation was deemed insufficient and dismissed.

Defendant now seeks to renew that part of this court's November 5, 2007 decision. Defendant argues that the motion to renew should be granted because the Plaintiff failed to place the Defendant on notice that it was contesting the service of the subpoenas on the reporters for the New York Post. Defendant also argues that the motion should be granted since it was due to inadvertence that the Defendant omitted from his opposition papers the statement that the reporters had been served with the subpoenas.

Defendant's motion is denied. Pursuant to CPLR §2221(e), a motion to renew shall be based upon new facts not offered on the prior motion that would change the prior determination or demonstrate that there has been a change in the law that would change the prior determination and that there is a reasonable justification for not presenting such facts on the prior motion. (CPLR §2221(e)). Service of the subpoenas, standing alone, does not constitute new evidence which merits a chance in this court's prior decision. The subpoena issue was but a factor in the prior determination.

However, upon review of this court's prior determination, the court erred in not addressing the portion of Defendant's motion for attorneys' fees. Real Property Law (RPL) §234 deals with a tenant's right to recover attorneys' fees in actions arising out of the lease of a residential property. Here, Plaintiff brought the underlying action claiming "Defendant in violation of his lease and law has thrown objects and fluids from the balcony Apartment." (Complaint, Second Cause of Action, para. 26). Whenever a lease provides that the landlord may recover attorneys' fees and expenses in an action which was brought as a result of the failure of the tenant to perform any part of the lease, there is an implied covenant by the landlord to pay the tenant reasonable attorneys' fees and expenses incurred in defending such an action. (RPL §234; 245 Realty

Associates v. Sussis, 243 AD2d 29 [1st Dept 1998]). Here, paragraph 20, "Fees and Expenses" provides that the tenant must reimburse the Owner for fees and expenses incurred from legal fees and disbursements for legal actions brought by the Owner for the tenant's default on any Lease provision. (Lease, para. 20(A)(5)). Therefore, pursuant to RPL §234, the Defendant is entitled to the legal fees stemming from the initial action only and not for fees stemming from the motions to amend the counterclaims. Accordingly it is

ORDERED that Defendant's motion to renew the counterclaim for defamation is denied; and it is further

ORDERED that Defendant is entitled to attorneys' fees stemming from the initial action brought by the Plaintiff against the Defendant; and it is further

ORDERED that the issue of how much Plaintiff owes the Defendant in attorneys' fees is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special referee and a

