Guardsman El. Co., Inc. v Apartment Inv. & Mgt. Co.

2008 NY Slip Op 30451(U)

February 14, 2008

Supreme Court, New York County

Docket Number: 0116447/2006

Judge: Martin Shulman

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SCANNED ON 2/21/2008

[* 1]

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

PRESENT: Shulman Justice PART 1

Shulman Elevator Co., Inc.

-v-

Gpt. Invest. & Maint. Co.

INDEX NO. 116417/06

MOTION DATE

MOTION SEQ. NO. #03

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 ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	2

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

FILED
FEB 20 2008
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: FEB 14 2008

MARTIN SHULMAN J.S.C.
J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 1
----------X
GUARDSMAN ELEVATOR CO., INC.,

Plaintiff, Index No. 116447/06

-against-

APARTMENT INVESTMENT & MANAGEMENT CO., AIMCO PROPERTIES, L.P., AIMCO CAPITAL, INC., OP PROPERTY MANAGEMENT, LLC, 107-145 WEST 135TH STREET ASSOCIATES LLP, PARRY C. BERKOWITZ and B SQUARED ENGINEERING, LLC.,

Defendants.
----------X
MARTIN SHULMAN, J.:

Motion Sequence Nos. 003 and 004 are consolidated for disposition. In Motion Sequence No. 003, defendants Apartment Investment & Management Co., Aimco Properties L.P., Aimco Capital, Inc., OP Property Management, LLC and 107-145 135th Street Associates, LLP (collectively "AIMCO") move by order to show cause ("OSC") *inter alia* to reargue this court's decision and order dated July 16, 2007 and entered July 20, 2007 (the "dismissal order") which denied AIMCO's motion to dismiss plaintiff Guardsman Elevator Co., Inc.'s ("Guardsman" or "plaintiff") first cause of action alleging prima facie tort. In Motion Sequence No. 004, Guardsman moves to reargue the dismissal order to the extent that it granted former defendants Parry C. Berkowitz's and B Squared Engineering, LLC's (collectively the "B Squared Defendants") motion to dismiss the complaint and for leave to amend the complaint to add a cause of action

against the B Squared Defendants for business defamation. Plaintiff opposes AIMCO's OSC and the B Squared Defendants oppose plaintiff's motion.[1]

AIMCO'S REARGUMENT OSC

CPLR 2221 states as follows:

> Motion affecting prior order.
>
> (a) A motion for leave to renew or to reargue a prior motion, for leave to appeal from, or to stay, vacate or modify, an order shall be made, on notice, to the judge who signed the order, unless he or she is for any reason unable to hear it ...

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Foley v. Roche, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1st Dept. 1979). Motions for leave to reargue are not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented. Pro Brokerage, Inc. v. Home Ins. Co., 99 A.D.2d 971, 472 N.Y.S.2d 661 (1st Dept. 1984); William P. Pahl Equipment Corp. v. Kassis, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1st Dept. 1992).

In support of its reargument OSC, AIMCO argues that the dismissal order is factually inconsistent to the extent that it "found that B Squared's conduct was not wrongful, but then held that Guardsman could proceed with a claim for prima facie tort against AIMCO despite the fact that AIMCO's termination of Guardsman was based

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[1] The court hereby incorporates the dismissal order's summary of the facts and claims in this action.

upon B Squared's evaluation of Guardsman's work which evaluation was held not to be wrongful." Fuerth Aff. in Supp. of OSC at ¶5. AIMCO's overly simplistic argument fails to account for plaintiff's claim that AIMCO terminated its contract with plaintiff for retaliatory reasons and utilized B Squared's evaluation of plaintiff as a pretext to wrongfully terminate the contract. Accordingly, the court grants reargument and upon granting same, adheres to the dismissal order's determination that the first cause of action stated a claim against AIMCO for prima facie tort.

GUARDSMAN'S MOTION TO REARGUE

In support of its motion for reargument, plaintiff disputes the court's finding that the complaint's allegations regarding the B Squared Defendants were conclusory and argues that B Squared's "alleged misconduct . . . is independently sufficient to support criminal liability", thus establishing the element of wrongful means necessary to sustain a claim for tortious interference with prospective contractual relations. At the outset, the court notes that Guardsman's arguments regarding the B Squared Defendants' alleged criminal conduct[2] were only summarily raised in its prior opposition to the B Squared Defendants' motion to dismiss. Guardsman now elaborates upon this allegation in its motion to reargue. However, as previously stated, motions for leave to reargue are not designed to provide an unsuccessful party with the opportunity to present arguments different from those originally presented.[3] Pro Brokerage, Inc. v. Home Ins. Co., supra;

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[2] Plaintiff contends that the B Squared Defendants are not licensed engineers in the State of New York yet have held themselves out as such, in violation of Education Law §6512, a class E felony.

[3] In any event, even assuming the truth of plaintiff's assertions, such "wrongful conduct" was not directed at Guardsman nor is it the cause of the injury Guardsman

William P. Pahl Equipment Corp. v. Kassis, supra. Accordingly, the court declines to grant reargument on this issue.

In support of its remaining claim that reargument should be granted and the fourth cause of action reinstated because the court incorrectly characterized the complaint's supporting allegations as conclusory, Guardsman cites Techcon Contracting, Inc. v. Village of Lynbrook, 5 Misc.3d 1004(A), 798 N.Y.S.2d 714 (Sup. Ct., Nassau Cty., 2004), as more factually on point than the cases cited in the dismissal order. In Techcon, the court permitted plaintiff to amend its complaint to add a cause of action for tortious interference with prospective economic advantage, finding that plaintiff sufficiently pled wrongful means by alleging, as the B Squared Defendants purportedly did, that defendants misrepresented plaintiff's work.

Having again reviewed the relevant case law, the court grants reargument and on granting same adheres to the determination dismissing the fourth cause of action against the B Squared Defendants. Guardsman's motion does not address Scalise v. Adler, 267 A.D.2d 295, 700 N.Y.S.2d 49 (2nd Dept., 1999), which the court cites in the dismissal order but did not fully expound upon. In the case at bar, Guardsman cannot establish that but for the B Squared Defendants' alleged misrepresentations to AIMCO, its at will contract would not have been terminated. Scalise, supra; see also, American Preferred Prescription, Inc. v. Health Mgmt., Inc., 252 A.D.2d 414, 678 N.Y.S.2d 1 (1st Dept., 1998). Indeed, plaintiff itself attributes the cause of its termination to AIMCO's alleged retaliation. For all of the foregoing reasons, plaintiff's motion is granted to the

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claims, to wit, cancellation of its contract with AIMCO. Simply put, Guardsman appears to lack standing to raise this issue in this context.

extent of granting reargument and upon granting same, the court adheres to its determinations set forth in the dismissal order.

GUARDSMAN'S MOTION TO AMEND

Leave to amend a pleading pursuant to CPLR §3025(b) should be freely granted absent prejudice or surprise resulting from the delay (see Edenwald Contr. Co. v City of New York, 60 N.Y.2d 957, 959, 471 N.Y.S.2d 55, 56 [1983]; Probst v. Cacoulidis, 295 A.D.2d 331, 743 N.Y.S.2d 509 [2nd Dept., 2002]). While the decision to allow or disallow an amendment is left to the court's sound discretion (see Edenwald Contr. Co. v. City of New York, 60 N.Y.2d at 959, 471 N.Y.S.2d at 56), a court need not grant leave to amend a pleading where the proposed amendment is palpably without merit (see Probst v. Cacoulidis, 295 A.D.2d at 332, 743 N.Y.S.2d at 51; Reuter v Haag, 224 A.D.2d 603, 638 N.Y.S.2d 673 [2nd Dept., 1996]).

Here, although the court dismissed the action against the B Squared Defendants, Guardsman nonetheless seeks to amend the complaint to allege a cause of action against the B Squared Defendants for business defamation. The proposed amended complaint (Exh. A to Holden Aff. in Support of Motion) alleges that the B Squared Defendants knowingly published false statements to AIMCO that Guardsman: failed to provide sufficient staffing; used non-conforming and non-specified equipment; failed to comply with the project manual; failed to provide a project schedule; and failed to communicate effectively. The B Squared Defendants argue that the proposed amendment lacks merit since the statements claimed to have been made are not defamatory and even if they were, they are protected by a qualified privilege, which plaintiff cannot defeat because it fails to demonstrate malice.

"Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance. . . The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction." Aronson v. Wiersma, 65 N.Y.2d 592, 593-594, 493 N.Y.S.2d 1006, 1007 (1985). Language will be considered defamatory if it tends to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation or disgrace, or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society. Kimmerle v. New York Evening Journal, 262 N.Y. 99, 102 (1933).

Here, although a statement tending to injure one in business or trade may be actionable as defamation (Techcon, supra, at *5), the court is unable to find the alleged statements defamatory. Notably, the statements in question do not accuse Guardsman of being "ignorant, incompetent, [or] incapable in [its] calling" (citations omitted). Amelkin v. Commercial Trading Co., Inc., 23 A.D.2d 830, 831, 259 N.Y.S.2d 396 (1st Dept., 1965), aff'd, 17 N.Y.2d 500, 267 N.Y.S.2d 218 (1966); Montenay LB Corp. v. Long Beach Recycling & Recovery Corp., N.Y.L.J. 8/19/91, p. 28, col. 5 (Sup. Ct., Nassau Cty.) Cf. Techcon, supra (allegations plaintiff's work was substandard and did not to meet contract specifications held sufficient to withstand a motion to dismiss); Brancaleone v. Mesagna, 290 A.D.2d 467, 736 N.Y.S.2d 685 (2nd Dept., 2002)(jury found statements were defamatory where defendant architect stated plaintiff general

contractor was incompetent and used inferior materials to cheat third party for whom they both performed work).

Here, the import of the allegedly defamatory statements was merely the B Squared Defendants' expression of their dissatisfaction with Guardsman's performance of its contractual obligations. Accordingly, leave to amend the complaint to add a cause of action against the B Squared Defendants for business defamation is denied, and it is

ORDERED that the AIMCO defendants' OSC for reargument is granted, and upon granting same, the court adheres to its prior decision sustaining the first cause of action for prima facie tort; and it is further

ORDERED that the portion of Guardsman's motion seeking reargument is granted, and upon granting same, the court adheres to its prior decision dismissing the fourth cause of action for interference with prospective contractual relations; and it is further

ORDERED that the portion of Guardsman's motion seeking leave to amend the complaint is denied; and it is further

ORDERED that the AIMCO defendants are directed to serve an answer to the complaint so that it is received by plaintiff's counsel in advance of the preliminary conference scheduled below.

The foregoing constitutes this court's Decision and Order. Copies of this Decision and Order have been sent to counsel for plaintiff and defendants.

The parties are directed to attend a preliminary conference on March 18, 2008 at 9:30 a.m., at I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

Dated: New York, New York
February 14, 2008

Hon. Martin Shulman, J.S.C.

HON. MARTIN SHULMAN

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