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

PRESENT: HON. JANE S. SOLOMON PART 55

Justice

Index Number : 114829/2007

KAISMAN, ARDEN

VS

HERNANDEZ, YAHAIRA

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. 114829 / 2007

MOTION DATE 5 - 22 - 2008

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 12 were read on this motion to/for reargue/renew

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 5
Answering Affidavits — Exhibits	6
Replying Affidavits	7 - 12

Cross-Motion: ☐ Yes ☐ No

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

FILED
JUN 12 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6-10-08

JANE S. SOLOMON J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55
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ARDEN KAISMAN and RINA KAISMAN,

INDEX NO. 114829/2007

Plaintiffs,

-against-

YAHAIRA HERNANDEZ, ESTHER HERARTE, JENNIFER V. STERN, PAUL BRISSON MD and EMILY DEEBS,

DECISION and ORDER

Defendants.

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JANE S. SOLOMON, J.

On March 12, 2008, this court granted the motion brought by defendants Yahaira Hernandez, Esther Herarte and Jennifer V. Stern (collectively, the "Moving Defendants")[1] to dismiss the Complaint of Arden Kaisman ("Kaisman") and his wife Rina Kaisman. Plaintiffs now move under CPLR § 2221 to reargue the motion based upon matters of fact or law allegedly overlooked or misapprehended by the court, and to renew the motion based upon new facts not offered on the prior motion. The motion is decided as follows.

The facts of this case were set forth in the March 12, 2008 decision in this action, as well as in the February 1, 2008 decision in the case Hernandez, et al. v. Kaisman, filed under

[1] Although defendants Paul Brisson, MD and Emily Deebs did not formally appear on the prior motion, the Complaint was dismissed as to all named defendants.

Index No. 104989/2007 (the "Related Action"). Briefly summarized, the three Moving Defendants previously worked for a joint medical practice operated by Kaisman and defendant Paul Brisson, MD. In the Related Action, the Moving Defendants sued Kaisman for sexual harassment, assault, battery and intentional infliction of emotional distress. Kaisman alleges that he first became aware of the Related Action on April 16, 2007, while he was being cross-examined as an expert witness in an unrelated trial. He later learned that the website "Courthouse News Service" (a news wire for lawyers) summarized the contents of the sexual harassment complaint on April 14, 2007.

Months later, Kaisman says he entered his name into Google and other internet search engines, and discovered links to several pornographic websites that included his name (the "Internet Search Results"). He alleges that the defendants, individually or in conspiracy with others, caused his name to appear within the Internet Search Results, and that this caused him to lose business and suffer emotionally. This action ensued, in which Kaisman claims intentional infliction of emotional distress and *prima facie* tort; his wife brings a derivative claim for loss of consortium.

In the March 12, 2008 decision, I concluded that, assuming defendants somehow caused Kaisman's name to appear in the

Internet Search Results, his admission to sending sexually explicit images to the Moving Defendants as email attachments defeats his claims for economic loss and emotional distress upon learning that his name was linked to pornography.

As part of his motion to reargue, Kaisman and his attorney argue that I misapprehended the facts in stating that Kaisman admitted to sending "sexually explicit" email attachments. Kaisman contends that only the sending of the emails (and only to certain employees) is a fact, and that it has always been disputed (in his mind) that the attachments were "sexually suggestive" or "pornographic." While he concedes that it was "stupid" of him to send the emails to his employees, he personally describes them as "humorous." In the words of his attorney:

> it was always Arden Kaisman's stance that the email attachments and the non-email comments and acts either had no sexual content or if any specific email attachment did, it was not "offensive" (or the recipients were sufficiently warned by a descriptive label and they welcomed the attachment's humor) and therefore, the email attachments and the non-email comments and acts "do not rise to the level of 'sexual harassment'" . . . because they "do not constitute abhorrent behavior of an extremely offensive nature . . . " Affirmation of Sidney M. Segall, ¶ 8.

In order to highlight the qualitative differences between what he admits to emailing and what he classifies as pornography, Kaisman submits a computer disc with some of the

email attachments, together with a montage of photographs of people engaged in sexual activity.[2] The latter are said to have been found when he followed the Internet links found in the Internet Search Results, and are provided as examples of what he considers indisputably pornographic, as a contrast to the images available to his female employees through his office emails. He contends that the material sent to them was not accurately described in the earlier decision.

Kaisman next argues that this action was misconstrued as a retaliatory one, in that the "wrong" alleged is not defendants' commencement of the Related Action, but rather their "intentional, vile, vicious, heinous and malicious causing" of the Internet Search Results. His lawyer contends that although Kaisman will have the burden of proving that defendants caused the Internet Search Results, there is an "eerie time proximity between the commencement of the Sexual Harassment action on April 12, 2007 and the first time Arden Kaisman's Internet search engine results came to his attention on October 12, 2007" (Segall Aff., ¶ 17).

As for the claimed damages, Kaisman argues that this court misconstrued the potential effect the Internet Search

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[2] Kaisman's gratuitous submission of the material here further undermines the assertion that his business reputation was somehow damaged by an untruthful linkage between his name and the web sites.

Results might have on him personally and professionally, contending that his sending of a few private emails with "disputed" contents does not defeat his claim to being damaged when his name becomes publicly linked to hardcore pornography.

With respect to the motion to renew, Kaisman submits the results of subpoenas served on Google. These results show that the same Internet Protocol ("IP") address (and therefore, the same computer used by one or a limited number of individuals) was responsible for creating the Internet Search Results over a period of a few days in September 2007. Further inquiries showed that this IP address is owned by a Texas company, which sub-licensed it to a company based in the Ukraine, which "seems willing to cooperate" in further investigation (Segall Aff., ¶ 17). Nothing is submitted, however, linking this data to defendants. Kaisman's attorney states that these results became available only after the motion was submitted, and therefore there is "reasonable justification" for the failure to present them previously (Segall Aff., ¶ 24).

Kaisman next submits evidence that purports to show that some of the material submitted by the Moving Defendants on the earlier motion and in the Related Action are not in the exact form he sent them. His attorney argues that this is evidence that they

are "playing fast and loose" with the evidence. (Supplemental Affirmation in Reply of Sidney M. Segall, ¶ 8.)

Next, to bolster his damages claim, Kaisman states that an April 8, 2008 Appointment List (not submitted due to confidentiality reasons) shows that his business has suffered, and that he will be able to tabulate specific economic losses at a later date.

Finally, Kaisman says that he now is obsessed with "Googling" his own name, and has been told he has an "incurable Internet disease" (Affidavit of Arden M. Kaisman, ¶ 11), in support of which he submits the report of a clinical psychologist and bills from a psychotherapist.

Discussion

To be sure, first, there are qualitative differences between the email attachments Kaisman sent to his employees and the content found in the Internet Search Results, and, second, the court's earlier decision could lead one to believe that Kaisman argued that the email attachments are "sexually explicit" despite his statements to the contrary. Reargument on this issue is granted to the extent that while I adhere to my original description of the email attachments as sexually related material, that conclusion is not based on Kaisman's admission.

Kaisman (and others) may very well find the email attachments "humorous," but they are visually and audibly insulting, and are inappropriate in any workplace. Merriam-Webster defines pornography as:

> (1) the depiction of erotic behavior (as in pictures or writing) intended to cause sexual excitement; (2) material (as books or a photograph) that depicts erotic behavior and is intended to cause sexual excitement; (3) the depiction of acts in a sensational manner so as to arouse a quick intense emotional reaction.
> (Merriam-Webster Online Dictionary. 2008.)

The material in the email attachments fits this description, particularly in the context of a workplace. As Justice Stewart wrote almost 44 years ago about pornography, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . ." (Jacobellis v. Ohio, 378 U.S. 184, 197 [1964] [Potter Stewart, J., concurring]). I say the same about the suitability of Kaisman's emails to his employees.

Accepting as true that Kaisman suffered damages from learning his name is associated with pornography, he still has failed to state an actionable claim against defendants. While on a motion to dismiss, the pleadings are to be afforded a liberal construction and plaintiffs are to be given the benefit of every possible favorable inference (Leon v. Martinez, 84 N.Y.2d 83

[1994]; CPLR §§ 3026, 3244), if allegations are without factual support, they fail to state a cause of action (M.J. & K. Co. v. Matthew Bender & Co., 220 A.D.2d 488 [2nd Dep't 1995]). That Kaisman's name appeared in the Internet Search Results after an online periodical reported the content of the publicly available court records of a sexual harassment lawsuit filed against him, does not support his allegation that defendants caused those results.

That branch of the motion seeking renewal is denied. Kaisman presents no reasonable justification for not submitting the newly alleged facts on the earlier motion (*see* Am. Audio Serv. Bureau Inc. v. AT & T Corp., 33 A.D.3d 473 [1st Dep't 2006]; CPLR § 2221[e][3]), and, in any event, the new facts would not change the outcome of the prior decision.

According, it hereby is

ORDERED that the branch of the motion seeking renewal is denied; and it further is

ORDERED that the branch of the motion seeking reargument is granted, and upon reargument, the court adheres to its original decision, the motion to dismiss is granted, and the Complaint is dismissed as to all defendants, and the Clerk is directed to enter judgment accordingly with costs and disbursements as taxed.

Dated: June 10, 2008

ENTER:

J.S.C.

JANE S. SOLOMON