

Stryker v Stelmak

2008 NY Slip Op 32238(U)

August 4, 2008

Supreme Court, New York County

Docket Number: 0117524/2006

Judge: Richard B. Lowe

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

PRESENT: MON. RICHARD B. LOWE, III Justice

PART 56

Stryker, Larry

INDEX NO.

117524/06

MOTION DATE

4/1/08

MOTION SEQ. NO.

006

MOTION CAL. NO.

of Felmark, Alex

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
AUG 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION

Dated: 8/4/08

[Signature]
MON. RICHARD B. LOWE, III

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

-----X
LARRY STRYKER,

Plaintiff,

-against-

Index No. 117524/06

ALEX STELMAK, An Individual,
STAN MASHOV, An Individual,
SIMONE V. PALAZZOLO, ESQ., An Individual,
and ADVANCED TECHNOLOGIES GROUP, LTD.,

Defendants.

FILED
AUG 11 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
Hon. Richard B. Lowe, III:

This action arises out of a purported agreement between plaintiff Larry Stryker and defendants Alex Stelmak (Stelmak) and Stan Mashov (Mashov) involving the ownership of stock in a business. Plaintiff alleges that defendants defrauded him of his ownership interest in corporate defendant Advanced Technologies Group, Ltd. (ATG). This court previously issued two decisions and orders in this matter on November 19, 2007 (the November 19th Decision) and December 20, 2007 (the December 20th Decision), in which it dismissed many of the claims asserted against Stelmak, Mashov and ATG as barred by the applicable statute of limitations.

Stelmak now moves for an order (1) dismissing the complaint with prejudice on the ground that it is barred by the doctrine of res judicata; (2) granting him monetary sanctions against plaintiff in the amount of actual legal fees, costs and disbursements incurred on this motion; and (3) barring plaintiff from commencing any further litigation against Stelmak except on prior order of this court.

Plaintiff cross-moves, pursuant to CPLR 2221, for an order granting him leave to reargue and renew the November 19th Decision and the December 20th Decision, and upon

reargument, issuing a supplemental order allowing him to re-serve the summons and complaint on defendants Stelmak and Mashov to include all claims previously dismissed for violations of the applicable statute of limitations, and allowing all claims to proceed against defendant ATG previously dismissed for violations of the applicable statute of limitations.

Stelmak cross-moves, pursuant to CPLR 2221, for an order granting him leave to reargue that portion of the November 19th Decision that extended plaintiff's time to serve a summons and complaint on Stelmak setting forth solely causes of action for abuse of process and malicious prosecution, and upon such reargument, denying plaintiff such extension.

BACKGROUND

The general facts of this matter were previously discussed in the November 19th Decision, and shall not be repeated here, except to the extent necessary to decide this motion.

On November 22, 2006, plaintiff served Stelmak with a summons and complaint alleging causes of action for malicious prosecution, abuse of process, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive trust, breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, common law fraud, common law negligent misrepresentation or intentional deceit, and injunctive relief (see Aff. of Jonathan David Bachrach, Exh B). Stelmak moved to dismiss the November 22, 2006 complaint for lack of proper service. His motion was granted on September 4, 2007. Thereafter, plaintiff made a motion to extend the time to serve the complaint on Stelmak and Mashov, setting forth the same causes of action as alleged in the previously dismissed complaint.

In the November 19th Decision, this court denied plaintiff's motion as to the eight causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty,

constructive trust, breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, common law fraud and common law negligent misrepresentation on the ground that they were barred by the applicable statute of limitations. However, this court did extend plaintiff's time to serve a summons and complaint against Stelmak with respect to his intentional tort claims for abuse of process and malicious prosecution, pursuant to CPLR 205 (a):

Plaintiff's motion to extend time to serve his summons and complaint should be denied as to all causes of action except malicious prosecution and abuse of process against Defendant Stelmak.

November 19, 2007 Decision, at 16. This court then ordered plaintiff "to serve a copy of his summons and complaint within 20 days of this order with notice of entry" (*id.*).

On December 4, 2007, well within the 20-day period, plaintiff re-served Stelmak. However, instead of serving Stelmak with a new summons and complaint containing the two intentional tort claims, plaintiff re-served Stelmak with the original November 22, 2006 summons and complaint (see Stelmak Aff., ¶ 2).

In its December 20th , 2007 Decision, this court granted ATG's motion to dismiss the causes of action for constructive trust, breach of contract, breach of the implied covenant of good faith and fair dealing, fraud, negligent misrepresentation and injunctive relief asserted against it on the ground that, as determined in the November 19th Decision, these causes of action were barred by the applicable statute of limitations.

DISCUSSION

Stelmak's Motion to Dismiss

Stelmak argues that the complaint that plaintiff served on him on December 4, 2007 must be dismissed because it is barred by the doctrine of res judicata, and because plaintiff was required to purchase a new index number for any new papers served, but failed to do so.

While Stelmak is correct that the eight causes of action for fraud/breach of contract previously dismissed by this court cannot stand, his theory is incorrect. Rather than being barred by res judicata, plaintiff's eight causes of action are barred by the law of the case. The purpose of the law of the case doctrine is to prevent relitigation of legal issues that have already been determined at an earlier stage of the proceeding (Dondi v Jones, 40 NY2d 8 [1976]; Martin v City of Cohoes, 37 NY2d 162 [1975]; Brownrigg v New York City Hous. Auth., 29 AD3d 721 [2d Dept 2006]). Thus, where a legal issue was necessarily resolved on the merits in a prior decision, the court's decision on that issue becomes the law of the case, precluding further litigation (see Thompson v Cooper, 24 AD3d 203 [1st Dept 2005]; Hass & Gottlieb v Sook Hi Lee, 11 AD3d 230 [1st Dept 2004]; Gee Tai Chong Realty Corp. v GA Insurance Co. of N.Y., 283 AD2d 295 [1st Dept 2001]).

Here, the November 19th Decision, which dismissed plaintiff's eight causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive trust, breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, common law fraud and common law negligent misrepresentation of action as barred by the applicable statute of limitations, necessarily resolved on the merits the issue of whether such claims were viable. Thus, that decision is now law of the case requiring that this court grant that

portion of Stelmak's motion which seeks dismissal of the previously dismissed eight causes of action for fraud/breach of contract (see In re Duell, 306 AD2d 223 [1st Dept 2003]; Bernstein v 1995 Assocs., 211 AD2d 560 [1st Dept 1995]; see e.g. In re Oak Street Mgt., Inc., 20 AD3d 571, 571 [2d Dept], lv granted 5 NY3d 711 [2005], appeal withdrawn 6 NY3d 808 [2006] ["Our prior resolution of this issue constitutes the law of the case and the appellants failed to show any basis for changing our prior determination"]).

However, that portion of Stelmak's motion seeking dismissal of plaintiff's causes of action for malicious prosecution and abuse of process is denied. While plaintiff certainly should have drafted a new complaint against Stelmak and Mashov containing only the two causes of action for intentional tort, and purchased an index number for that complaint (see CPLR 306-a), the failure to obtain an index number is not a jurisdictional defect and does not require dismissal of the complaint (Allianz v City of New York, 19 AD3d 159 [1st Dept 2005]). Rather, pursuant to CPLR 2001, such failure was a mere defect or irregularity, which may be disregarded, if the opposing party is not prejudiced:

At any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, including the failure to purchase or acquire an index number or other mistake in the filing process, to be corrected, upon such terms as may be just, or if a substantial right of a party is not prejudiced, the mistake, omission, defect or irregularity shall be disregarded, providing that any applicable fees shall be paid.

Here, Stelmak was clearly not prejudiced by plaintiff's failure to draft a new complaint and purchase a new index number, as he indisputably had notice of plaintiff's claims for malicious prosecution and abuse of process since the time of the original defective service of process (see Crawford v Beth Israel Medical Center, 12 Misc 3d 832 [Sup Ct, NY County

2006)). Moreover, it is clear that by serving Stelmak with the old complaint within 20 days of the November 19th Decision, plaintiff technically and literally complied with the language of the order contained within that decision (see November 19th Decision, at 15 [ordering plaintiff to “serve a copy of *his* summons and complaint within 20 days of this order”] [emphasis added]).

Accordingly, under the circumstances, the court can treat the failure to obtain a separate index number for the malicious prosecution and abuse of process claims “as a mere irregularity to be corrected on appropriate terms” (Kleinman, Saltzman & Goodfriend v Marshall, 158 Misc 2d 640, 643 [Sup Ct, Rockland County 1993] [citing CPLR 3001]). The court chooses to exercise its discretion in this matter as follows: plaintiff is directed to draft a new complaint containing the two causes of action for malicious prosecution and abuse of process, to obtain a new index number and pay the filing fee therefore, and to serve a copy of the new summons and complaint upon defendants within 20 days of this order with notice of entry (see Ruiz v New York City Hous. Auth., 216 AD2d 258, 258 [1st Dept 1995] [action not dismissed for failure to comply with CPLR 306-a and 306-b “where plaintiff had served defendant with the summons and complaint in this action under the index number purchased (in a prior proceeding), the revenue-raising purposes of the statutory scheme were satisfied by plaintiff’s eventual purchase of a new index number, and defendant suffered no prejudice”]). In addition, since plaintiff technically complied with the November 19th Decision and served Stelmak with a complaint containing the two intentional tort causes of action within the 20-day period, plaintiff’s new complaint is deemed properly served nunc pro tunc (see Allianz v City of New York, 19 AD3d 159, supra).

That portion of the motion seeking an award of monetary sanctions is denied.

Stelmak has not demonstrated that plaintiff's actions completely lack merit, and, as such, the imposition of costs and fees is not appropriate (see Grossman v Pendant Realty Corp., 221 AD2d 240 [1st Dept 1995], lv dismissed 88 NY2d 919 [1996]; North American Van Lines, Inc. v American Intl. Companies, 11 Misc 3d 1076[A] [Sup Ct, NY County 2006], affd 38 AD3d 450 [1st Dept 2007]). Stelmak's request for an order barring plaintiff from commencing any further litigation, except on the prior order of this court, is also denied, as Stelmak fails to cite any legal authority in support of this proposition.

Plaintiff's Cross-Motion For Reargument and Renewal

A motion for reargument is addressed to the sound discretion of the trial court, and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or misapplied any controlling principle of law (McGill v Goldman, 261 AD2d 593 [2d Dept 1999]; Opton Handler Gottlieb Feiler Landau & Hirsch v Patel, 203 AD2d 72 [1st Dept 1994]). It is not designed to provide the unsuccessful party with successive opportunities to argue once again the very issues previously decided (William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 [1st Dept], lv dismissed in part, denied in part 80 NY2d 1005 [1992]; Bliss v Jaffin, 176 AD2d 106 [1st Dept 1991]), or to present arguments different from those originally asserted (Foley v Roche, 68 AD2d 558 [1st Dept 1979]).

In particular, reargument may not be granted where the movant simply abandons its prior arguments, and asserts arguments that are inconsistent with its own prior arguments. For instance, in DeSoignies v Cornasesk House Tenants' Corp. (21 AD3d 715 [1st Dept 2005]), the Court held that:

The IAS Court improperly granted plaintiff reargument, as plaintiff had not shown how the motion court misconstrued relevant facts or

misapplied governing law (CPLR 2221). Rather, plaintiff had abandoned her earlier contention that the 1972 letter exempted her from applying for approval prior to subletting the Apartments, and instead claimed that after the adoption of the 2002 Rules, any attempt to apply for approval of a sublease for her apartments would have been futile. Reargument is not available where the movant seeks only to argue a new theory of liability not previously advanced.

Id. at 718 (citations and internal quotation marks omitted).

Plaintiff's motion for reargument is denied. Plaintiff fails to demonstrate that the court overlooked or misapplied any controlling principle of law in granting the dismissal motions (see CPLR 2221 [d] [2]; Daluise v Sottile, 15 AD3d 609 [2d Dept 2005]; Armstead v Morgan Guar. Trust Co. of New York, 13 AD3d 294 [1st Dept 2004]). Moreover, plaintiff is improperly advancing legal arguments that are inconsistent with, and completely contradict, his prior arguments.

Just like the plaintiff in DeSoignies, plaintiff now attempts to abandon the factual assertions and legal arguments made in support of his original motion to extend the time to serve the complaint, and in opposition to ATG's motion to dismiss. Plaintiff's prior arguments were based solely upon on CPLR 306-b. In support of his motion to reargue, plaintiff abandons this argument and now contends, for the first time, that the "controlling legal principle" of the prior motions was CPLR 203 (e), and that this court overlooked this controlling principle of law. Plaintiff admits that he did not even mention CPLR 203 (e) in the prior motions (Stryker Aff., ¶ 25 ["plaintiff failed to raise the specter of CPLR 203 (e) in his response to defendant's initial motion to dismiss"]). Plaintiff also now advances new legal theories, such as equitable estoppel and respondeat superior, and the new argument that, although Stelmak's defamation case against plaintiff was dismissed on May 19, 2005, the action was not "terminated" for statute of

limitations purposes until November of 2006, when Stelmak “exhausted” all of his rights with respect to the litigation.

However, a motion for reargument is not a vehicle for parties to “advance arguments different from those tendered on the original application” and “may not be employed as a device for the unsuccessful party to assume a different position inconsistent with that taken on the original motion” (Foley v Roche, 68 AD2d at 568; see also CPLR 2221 [d]; DeSoignies v Cornasesk House Tenants’ Corp., 21 AD3d 715, *supra*; 85-10 34th Avenue Apt. Corp. v Nationwide Mut. Ins. Co., 283 AD2d 604 [2d Dept 2001]; Rubinstein v Goldman, 225 AD2d 328 [1st Dept], ly denied 88 NY2d 815 [1996]). Moreover, plaintiff offers no reason why these arguments were not raised in his original motion and opposition papers (see Hua Nan Commercial Bank, Ltd. v Albicocco, 270 AD2d 265 [2d Dept 2000]).

Plaintiff also moves for leave to renew. A motion for renewal “shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221 [e] [2]; see also Brooklyn Welding Corp. v Chin, 236 AD2d 392, 392 [2d Dept 1997]). Renewal is properly denied where the motion is “based upon evidence that was available at the time of the original motion” (Atkins v Malota, 1 AD3d 294, 294 [1st Dept 2003], ly dismissed 3 NY3d 701 [2004]), or where “such evidence would not have altered the result” (In re Will of Forray, 234 AD2d 16, 16 [1st Dept 1996], ly dismissed in part, denied in part 90 NY2d 876 [1997]; see also Cerro v Washington County Bd. of Supervisors, 270 AD2d 679 [3d Dept], appeal dismissed 95 NY2d 887 [2000]).

Where new or additional facts contained in a renewal motion were known to the movant at the time the original motion was made, the renewal evidence must be accompanied by

a valid explanation for failing to present those facts at that time (see Miller v Fein, 269 AD2d 371 [2d Dept], lv dismissed 95 NY2d 887 [2000]). The absence of a valid explanation for failing to present the renewal facts at the time of original motion is grounds for denial (see Natale v Jeffrey Samel & Assocs., 264 AD2d 384 [2d Dept 1999]).

Plaintiff's motion for renewal is also denied. Plaintiff's renewal motion is not based on any new facts, except for an unexplained and undated document entitled "Advanced Technologies Group, Ltd," attached as Exhibit H to plaintiff's papers. Although plaintiff contends that Exhibit H is a "new fact[]" not offered in the prior motion that would change the prior determination" (Aff. of Karim H. Kamal, ¶ 35), plaintiff fails to identify this document by source, fails to explain what this document is evidence of, or what it shows, except to allege that a February 3, 2000 ATG filing makes no mention of Oxford Global Network, Ltd., ATG's former name (Kamal Aff., ¶ 34 ["Defendant's filing in Nevada as ATG on February 3, 2000, makes no mention whatsoever of its prior name of Oxford Global Network, Ltd"]). Plaintiff completely fails to suggest the relevance of this document to this motion or this litigation, and provides no explanation of how this "new fact" would change the prior determination.

Moreover, it is clear that this untitled document cannot be characterized as a "new fact." The document appears to be a recent download from the internet which contains information that is up to 11 years old, and which obviously could have been previously downloaded for use on the prior motions. Plaintiff also fails to explain why this document was not offered in the prior motions.

Accordingly, the motion to renew must be denied, as the new document that plaintiff seeks to submit was readily available on the original motions (see CPLR 2221 [e] [2];

Dahlin v Paladino, 14 AD3d 647 [2d Dept 2005]), and plaintiff does not offer a reasonable justification for not presenting this document in connection with the prior motions (see CPLR 2221 [e] [3]; Interpublic Group of Companies v National Union Fire Ins. Co. of Pittsburgh, PA, 8 AD3d 169 [1st Dept 2004]; Aviles v San Rafael Cooperativa de Ahorro y Credito, 7 AD3d 431 [1st Dept], ly dismissed 4 NY3d 739 [2004]). In any event, even if the court were to consider this document, it would adhere to the prior determination, as plaintiff fails to demonstrate that the “new” facts would have warranted a different result (see Kaufman v Kunis, 14 AD3d 542 [2d Dept 2005]; Herrera v Matlin, 4 AD3d 139 [1st Dept 2004]).

Stelmak’s Cross Motion for Reargument

In support of his motion for reargument of the November 19th Decision, Stelmak argues that, in extending plaintiff’s time to serve a summons and complaint asserting claims for malicious prosecution and abuse of process, this court overlooked or misapprehended the application of CPLR 205 (a) to the timeliness of plaintiff’s claims.

Stelmak’s motion for reargument is denied. In making the argument that CPLR 205 (a) does not apply to this action, and that thus, plaintiff’s intentional tort claims were time-barred by May 19, 2006, prior to the commencement of this action on November 23, 2006, Stelmak merely repeats and rehashes the same arguments that were originally presented and rejected on the prior motion, which is insufficient to grant a motion for reargument (see Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971 [1st Dept 1984]; Foley v Roche, 68 AD2d 558, supra). In any event, Stelmak fails to demonstrate that this court overlooked or misapplied any controlling principle of law in the November 19th Decision (see CPLR 2221 [d] [2]; Spinale v 10 West 66th Street Corp., 193 AD2d 431 [1st Dept 1993] [denying motion for leave to reargue since

there was no showing that the court overlooked or misapprehended relevant facts or controlling law in prior decision]; see also Daluise v Sottile, 15 AD3d 609, supra; Armstead v Morgan Guar. Trust Co. of New York, 13 AD3d 294, supra).

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED that the portion of defendant Alex Stelmak's motion to dismiss which seeks dismissal of the eight causes of action for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, constructive trust, breach of contract, breach of the implied covenant of good faith and fair dealing, quantum meruit, common law fraud and common law negligent misrepresentation is granted; and it is further

ORDERED that the portions of Stelmak's motion to dismiss which seek dismissal of plaintiff's causes of action for malicious prosecution and abuse of process, the imposition of monetary sanctions against plaintiff in the amount of actual legal fees, costs and disbursements incurred on this motion, and an order barring plaintiff from commencing any further litigation against Stelmak except on prior order of this court are denied; and it is further

ORDERED that plaintiff is directed to draft a new complaint containing the two causes of action for malicious prosecution and abuse of process, to obtain a new index number and pay the filing fee therefore, and to serve a copy of the new summons and complaint upon defendants within 20 days of this order with notice of entry; and it is further

ORDERED that plaintiff's cross motion for reargument and renewal is denied; and it is further

ORDERED that defendant Alex Stelmak's cross motion for reargument is denied.

Dated: August 4, 2008

ENTER:



J.S.C.

HON. RICHARD B. LOWE, III

FILED

AUG 11 2008

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